10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 40.

CLARA E. SYLVESTER AND MAY L. SYLVESTER,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED DECEMBER 20, 1907.

(20,942.)

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SUPREME COURT OF THE UNITED STATES

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No. 227.

CLARA E. SYLVESTER AND MAY L. SYLVESTER, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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Filed Feb. 2, 1907. C. S. Reinhart, Clerk.

In the Superior Court of the State of Washington for Thurston County.

No. 3084.

Mrs. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs and Appellants,

v.

THE STATE OF WASHINGTON, Substituted as Defendant for A. B. Allison and Elizabeth Allison, His Wife, Defendants, Defendant and Respondent.

Transcript on Appeal to the Supreme Court of the State of Washington.

1 In the Supreme Court of the State of Washington for Thurston County.

No. —.

Mrs. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,

vs.

A. B. ALLISON and —— ALLISON, His Wife, Defendants.

Complaint.

The plaintiffs above named complain of the defendants, and allege:

I.

That these plaintiffs are the owners and entitled to the possession of the following described premises, situated in the County of Thurston, State of Washington, bounded and described as follows, to-wit: Commencing at a point south twenty-four degrees, twenty-three minutes west nineteen and ten one-hundredths chains from the north-west corner of Main and Union Streets, in the City of Olympia, Thurston County; thence south seven chains and fifty links; thence west eight chains and fifty eight links; thence north forty seven degrees west one chain and seventy three links; thence north forty eight degrees thirty minutes west one chain and sixty links; thence north sixty five degrees west one chain and ninety three links; thence north thirty three degrees thirty minutes west two chains and eighty links; thence north thirty eight degrees west one chain and seventeen links; thence north forty five degrees west one chain and eighty seven links; thence east sixteen chains and four links more or less

to the place of beginning, containing ten acres more or less, and being a part of Donation Claim No. 47 of Edmund Sylvester.

II.

That the defendants wrongfully withhold the same from them, the said plaintiffs, and claim some interest in said premises adverse to plaintiffs, which is unfounded and without right.

III.

That the value of said lands and the amount in dispute in this action exceeds the sum of ten thousand dollars.

2 IV.

Plaintiffs claim title to the land in dispute under and by virtue of a patent to said Edmund Sylvester, now deceased, the said Clara E. Sylvester being the widow, and the said May L. Sylvester, being the daughter, and said plaintiffs being the sole surviving heirs at law, of said Edmund Sylvester, which patent was issued May 3, 1860, by the Government of the United States, under the provisions of the Act of September 27, 1850, commonly known as the "Oregon Donation Act," and their title, right and authority arises under the provisions of said statute, the statutes supplemental thereto, and the Constitution and laws of the United States.

Wherefore, plaintiffs demand judgment for the recovery and possession of said lands, that defendants may be adjudged to have no estate or interest therein, that the plaintiffs' title is good and valid, and that plaintiffs also have judgment for their costs and disbursements incurred herein.

MAY SYLVESTER AND
GEO. M. SAVAGE,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of King, ss:

May L. Sylvester being first duly sworn on oath says: That she is one of the plaintiffs in the above entitled action; that she has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

MAY L. SYLVESTER.

3–5 Subscribed and sworn to before me this 1st day of January, 1905.

LIVINGSTON B. STEDMAN,
Notary Public in and for the State of Washington,
Residing at the City of Seattle, in Said State.

(Indorsed:) Filed February 6, 1905, B. T. Baker, Clerk Superior Court Thurston Co., Wash.

* * * * * * *

6 In the Superior Court of the State of Washington for Thurston County.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON, Defendant (Substituted for A. B. Allison and —— Allison, His Wife, Defendants).

Answer.

Comes now the defendant, the State of Washington, and for answer to the complaint of the plaintiffs:

I.

Denies paragraph I of Plaintiffs' complaint and each and every part thereof and each and every fact therein alleged:

II.

Denies paragraph II of said complaint and each and every part thereof except that it admits that it claims an interest in and to said premises, but denies that its claim or interest is unfounded or without right.

III.

For answer to paragraph III of said complaint this defendant alleges that the said land, separate from the improvements thereon, is of the value of $10,000, but of no greater value, and that the improvements thereon are the approximate value of $23,200 otherwise defendant denies said paragraph.

IV.

For answer to paragraph IV of said complaint this defendant admits that Clara E. Sylvester and May L. Sylvester are the widow and daughter, respectively, of said Edmund Sylvester, and are the sole heirs of said Edmund Sylvester, but as to other matters and things set up in said paragraph IV this defendant alleges it
7 has no knowledge or information sufficient to form a belief and therefore denies the same, and particularly denies that the plaintiffs or either of them have any right, title or interest of any kind or character whatsoever in and to said property by virtue of said patent or otherwise or by virtue of said acts or otherwise.

For a further answer and first affirmative defense to plaintiffs cause of action this defendant, the State of Washington, alleges:

I.

That said land described in paragraph I of plaintiffs' complaint to-wit:

"Commencing at a point south twenty-four degrees twenty-three minutes west nineteen and ten one-hundredths chains from the northwest corner of Main and Union Streets, in the City of Olympia, Thurston County; thence south seven chains and fifty links; thence

west eight chains and fifty-eight links; thence north forty-seven degrees west one chain and seventy-three links; thence north forty-eight degrees thirty minutes west one chain and sixty links; thence north sixty-five degrees wes- one chain and ninety-three links; thence north thirty-three degrees thirty minutes west two chains and eighty links; thence north thirty-eight degrees west one chain and seventeen links; thence north forty-five degrees west one chain and eighty-seven links; thence east sixteen chains and four links more or less, to the place of beginning, containing ten acres more or less and being a part of Donation Claim No. 47 of Edmund Sylvester;"

are part of lands settled upon by one Edmund Sylvester on February 1, 1850, and which lands, under and by virtue and in compliance with an act of Congress, approved September 27, 1850, entitled "An act to create the office of Surveyor General of the public lands in Oregon and to provide for the survey and to make donations of the public lands;" and the amendatory acts thereof approved February 14, 1853 and July 17, 1854, were patented to said Edmund Sylvester as Donation Claim No. 47.

II.

That on January 18, 1855, in accordance with an act of the Territorial Legislature of Washington entitled "An act to provide for the selection of the place for the location of the seat of government for the Territory of Washington," passes January 9, 1855, the said Edmund Sylvester, under and by virtue of the Federal Statutes, and his wife, Clara E. Sylvester, one of the plaintiffs herein, made, executed, and delivered to the Territory of Washington a deed in the following words and figures, to-wit:

This Indenture made and entered into this eighteenth day of January, in the year of our Lord one thousand eight hundred and fifty five, between Edmund Sylvester and Clara E. Sylvester his wife, of the County of Thurston and Territory of Washington of the first part, and the Territory of Washington, of the second part,

Witnesseth, that for and in consideration of the sum of One Dollar to them the said party of the first part in hand paid by the said party of the second part: the receipt whereof is hereby acknowledged, hath this day bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, all that certain lot, piece or parcel of land, on the land claim of the said party of the first part, in the County of Thurston and Territory of Washington, in Section twenty three (23) Township eighteen (18) North Range two (2) west, containing ten (10) acres and more particularly described as follows: Commencing at a point South Twenty-four (24) degrees, twenty-three min. (23), W. Nineteen (19) and ten (10) hundredths chains from the northwest corner of Main Street and Union Streets, thence South seven (7) chains and fifty (50) links—thence west eight (8) chains and fifty eight (58) links—thence north forty seven (47) deg. west, one (1) chain and seventy three (73) links—thence north

forty eight (48) deg. thirty (30) min. west one (1) chain and sixty (60) links—thence north sixty five (65) deg. west one (1) chain and ninety three (93) links, thence north thirty three deg. (33) thirty (30) min. west two (2) chains and eighty (80) links—thence north thirty eight (38) deg. west one (1) chain and seventeen (17) links, thence north forty-five (45) deg. west one (1) chain and eighty seven (87) links, thence east sixteen (16) chains and four (4) links to place of beginning.

To have and to hold the same, to the said party of the second part forever, free of any claim of the said party of the first —, their heirs and assigns, or any or all persons claiming by, through, from or under them or any of them.

In testimony whereof the said party of the first part hath hereunto set their hands and affixed their seals the da[illegible]d year first above written.

(Signed) EDMUND SYLVESTER. [SEAL.]
CLARA E. SYLVESTER. [SEAL.]

Signed and delivered in the presence of

Attest:
B. F. KENDALL.
ELWOOD EVANS.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Personally appeared before me at the said Olympia on the
10 twentieth day of February, year 1855, the above named Edmund Sylvester who signed and sealed the foregoing instrument in writing, and acknowledged the same to be his free and voluntary act and deed, and also on the same day and at the same place personally appeared before me the above named Clara E. Sylvester, wife of the said Edmund Sylvester, who signed and sealed the foregoing instrument in writing, and being examined by me separate and apart from her husband and had made known to her by me the contents of the above instrument in writing acknowledged the same to be her free act and deed for the purposes therein mentioned, and that she executed the same voluntarily of her own free will and without fear or coercion from her husband.

Before me

B. F. KENDALL. [SEAL.]
Notary Public.

Recorded here April 26th, 1858.

WILLIAM WRIGHT, *Co. Rec.*,
By A. I. MOSES, *Deputy.*

That said deed was duly recorded in volume 3 of Deed Records at page 34 in the Auditor's office, Thurston County, Washington, on April 26, 1858.

III.

That at the time, to-wit, January 18, 1855, that the said Edmund Sylvester and Clara E. Sylvester, his wife, made, executed and delivered said deed, heretofore set out, to the Territory of Washington, the said Edmund Sylvester, who at all times was a qualified claimant under said Federal statutes, had filed his notification No. 44 for said lands and had resided upon and cultivated said lands for more than four years continuously after the said date of settlement thereon.

IV.

That immediately thereafter the Territory of Washington entered into possession of the said land, described in said deed heretofore set out, conveyed, to-wit, by said Edmund Sylvester and wife, and in 1856 the said Territory of Washington caused to be erected upon said land a legislative assembly building for the Territory of Washington, and that from the time of taking possession of said
11 tract by the Territory of Washington in 1855 to the present time, the possession of the said tract by the Territory of Washington, and its successor, the State of Washington, defendant herein, has been actual, open, notorious and continuous, and that the said Territory of Washington and its successor, the State of Washington, has in good faith, from the time said Territory of Washington took possession of said tract on January 18, 1855, to the present time, been in actual, open, notorious and continuous possession of said described tract, and that said tract has from the time it was taken possession of by the Territory of Washington in 1855 to the present time, been used as the capitol site for the Territory and State of Washington; that said property has at all times been treated as the property of the State and no taxes assessed against the same and therefore none to pay, and that neither the Territory of Washington nor its successor, the State of Washington, defendant herein, have ever sold or conveyed to any one any interest whatever in said property.

V.

That the plaintiffs in this action have no right, title or interest of any kind or character in and to said property set up in their complaint, and the State of Washington succeeded to the rights of the Territory of Washington, and this defendant, by virtue of said conveyance to the Territory of Washington by Edmund Sylvester and Clara E. Sylvester, his wife, and the actual, open, notorious and continuous possession of said tract, as heretofore alleged, or by either of said facts and things, has acquired a good and sufficient
12 title in fee simple to said property.

Wherefore the defendant, the State of Washington, prays that this action be dismissed, that the plaintiffs go hence without delay, that it be declared to be the absolute owner in fee simple of said described premises, and that it be granted such other and further relief herein of any kind and character sufficient and necessary to

declare it the owner in fee simple to said property and that it recover its costs and disbursements herein.

For a further and second affirmative defense the defendant herein, the State of Washington, alleges:

I.

That the Territory of Washington and its successor, the State of Washington, has been in the actual, open, notorious and continuous possession of said property described in plaintiffs' complaint in paragraph I, to-wit:

"Commencing at a point south twenty-four deg. twenty-three min. west nineteen and ten one-hundredths chains from the northwest corner of Main and Union Streets, in the City of Olympia, Thurston County; thence south seven chains and fifty links; thence west eight chains and fifty-eight links; thence north forty-seven deg. west one chain and seventy-three links; thence north forty-eight deg. thirty min. west one chain and sixty links; thence north thirty-three deg. thirty min. west two chains and eighty links; thence north thirty eight deg. west one chain and seventeen links; thence north forty five deg. west one chain and eighty-seven links; thence east sixteen chains and four links more or less to the place of beginning, containing ten acres more or less, and being a part of Donation Claim No. 47 of Edmund Sylvester."

for more than seven successive years, to-wit, from the 18th day of January, 1855, and that this defendant has a connected title to said land in law and in equity deducible of record from the United States, to-wit, a good and sufficient conveyance to said property from Edmund Sylvester having acquired title to said property directly from the United States under and by virtue of the Federal Statutes and laws thereof and conveyed said property to the Territory
13 of Washington on the 18th day of January, 1855, from which date the Territory of Washington and the State of Washington has been in actual, open and notorious possession of the same.

II

That neither the plaintiffs nor their ancestors, predecessors or grantors have been seized or possessed of said premises set up in paragraph I of said Complaint, being the lands and premises in question, within ten years before the commencement of this action.

III

That the plaintiffs have not brought their action within seven years next after the possession having been taken by the Territory of Washington or this defendant, its successor, as aforesaid, and the time limited by law within which the plaintiffs could maintain their action has expired and the statutes of limitations have run against their right to maintain this action and the plaintiffs have not brought this action within the time limited by law, and this defendant, herein and now pleads as a bar to the right of the plaintiffs to maintain this action, the statute of limitations and alleges

that the plaintiffs have not brought this action within the time limited by law.

Wherefore this defendant prays that this action be dismissed; that this defendant be granted his costs and disbursements herein and such other and further relief as the facts herein may entitle him.

For a counter claim herein this defendant alleges:

I

That the property herein described in paragraph I of plain-
14 tiffs' complaint is property in which this defendant has and asserts a fee simple title by virtue of a deed to the Territory of Washington to said property from said Edmund Sylvester and Clara E. Sylvester, his wife, made, executed and delivered January 18, 1855, at which time the said Edmund Sylvester and Clara E. Sylvester, his wife, had full and legal title thereto with the right to convey the same by virtue of settlement, residence and cultivation thereon under the various acts of Congress, known as the Oregon Donation Act and amendatory acts thereof, heretofore set out in other parts of this answer, and that upon taking possession of said property in 1855 this defendant thereafter in 1856 in good faith constructed and erected permanent improvements thereon, consisting of a legislative assembly building of the present value of $1,000 and thereafter caused to be constructed, partially upon said land, set up in paragraph I of plaintiff's complaint and partially upon a tract of land consisting of two acres lying directly north of said tract, a large expensive basement upon which to erect a capitol for the State of Washington; that said basement is approximately one half upon the land described in plaintiffs' complaint and has been looked after and cared for and preserved by the State of Washington, and was constructed at an expense of $47,400, exclusive of plans, etc., and the defendant alleges that the present value of said basement is $47,400, one half of which amount approximately represents the value of so much of said basement as is constructed upon the lands set up in paragraph I of plaintiffs' complaint.

II

That the land set up in paragraph I of plaintiffs' com-
15 plaint separate and apart from the permanent improvements thereon are no greater value than $10,000.

Wherefore this defendant prays that in any event, though not in anywise conceding that the plaintiffs have any right, title or interest of any kind or character in and to said property, that should a judgment or verdict be found against this defendant that the value of the improvements placed upon said land by the defendant be specifically found and that this defendant recover, as provided by law, the value of said improvements.

Wherefore this defendant prays generally that this action of the plaintiffs be dismissed, that they go hence without day, that this defendant be allowed all equitable and legal relief herein, and all relief which the facts may show it entitled to, that it recover its

costs and disbursements herein and that in any event it be allowed the value of its permanent improvements.

JOHN D. ATKINSON,
ROBERT F. BOOTH,
A. J. FALKNOR,
Attorney General and Assistants,
Attorneys for the State of Washington.

STATE OF WASHINGTON,
County of Thurston, ss:

John D. Atkinson, being first duly sworn, on oath deposes and says: That he is the Attorney General of the State of Washington and makes this verification as such officer in behalf of said State, that he has read the above and foregoing answer, knows the contents thereof, and states the same to be true as he verily believes.

JOHN D. ATKINSON.

16 Subscribed and sworn to before me this 1st day of April, 1905.

[SEAL.] P. M. TROY,
Notary Public in and for the said County and State, residing at Olympia, Washington.

(Indorsed:) Filed Superior Court Thurston County, Wash. Apr. 5, 1905, B. T. Baker, Clerk.

17 In the Superior Court of the State of Washington for Thurston County.

No. —.

MR. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON, Defendant (Substituted for A. B. Allison and —— Allison, His Wife, Defendants).

Reply.

Come now the above named plaintiffs, and for reply to the answer of the defendant herein, the State of Washington, say:

I

For reply to paragraph III of the defendant's answer, plaintiffs deny that the land therein referred to is of no greater value than $10,000.00, deny that the improvements thereon, if any there are, are of the approximate value of $23,200, or any value whatever, deny that structures upon said land are improvements, deny that they are of any value to these plaintiffs whatever, or that they add to the value of said land, excepting these plaintiffs admit that the building erected upon said land at the expense of the government

of the United States is of the approximate value of $100.00 for junk.

For reply to the further answer and first affirmative defense of defendant,

I

For reply to paragraph II of the defendant's further answer and first affirmative defense, plaintiffs admit the signing of a deed of release by Edmund Sylvester and Clara E. Sylvester, his wife, to the Territory of Washington, on or about the date in said paragraph stated, but as to whether the copy of said deed of release set
18 out in said paragraph is a true copy of said deed of release these plaintiffs have no knowledge or information sufficient to form a belief, and therefore they deny the same; deny each and every other allegation in said paragraph contained, and especially deny that said deed of release was made, executed and delivered under and by virtue of the federal statutes, and alleges that said deed of release was signed pursuant to and in accordance with the oral contract or agreement between the parties to said deed of release, which agreement is particularly set out hereinafter in the affirmative reply of plaintiffs, is hereby referred to and made a part of this paragraph, and also in accordance with the provisions of an act of the Legislature of the Territory of Washington, entitled, "An act to provide for the selection of the place for the location of the Seat of Government of the Territory of Washington."

II.

For reply to paragraph III of defendant's further answer and first affirmative defense, plaintiffs admit that Edmund Sylvester was a qualified claimant under the federal statutes at the time he filed notification No. 44 for said lands, but as to the time when the said notification was filed, and as to the time when he became a qualified claimant under the federal statutes, and all other matters in said paragraph III set out, excepting as herein expressly admitted these plaintiffs deny any knowledge or information sufficient to form a belief, and therefore deny the same.

III.

For reply to paragraph IV of defendant's further answer and first affirmative defense, these plaintiffs deny each and every
19 allegation in said paragraph contained, excepting such as is herein specifically admitted. Plaintiffs admit that the Territory of Washington entered into possession of a portion of the land described in plaintiffs' complaint subsequently to the signing of the deed of release by Edmund Sylvester and wife, and that thereafter was erected thereon at the expense of the government of the United States a legislative assembly building for the use of the Territory of Washington and that from the time of the taking possession of said tract by the Territory until on or about the 11th day of November, 1899, the possession thereof by the Territory was not adverse to plaintiffs nor under color of title, but was as the tenant at will of

Edmund Sylvester, and these plaintiffs, that on or about said last mentioned date the State of Washington entered into possession of said land, but plaintiffs allege that such possession was not continuous, adverse to plaintiffs nor under color of title, but was as the tenant at will of these plaintiffs, and so held such possession until on or about the 21st day of March, 1893, and thereafter entered into possession of said land and held possession thereof under the terms and conditions of a certain deed from these plaintiffs to the State of Washington hereinafter in plaintiffs affirmative reply set out, until the state abandoned said land and removed its property therefrom, and ceased to occupy and use said land for any purpose whatever, as hereinafter set out. As to whether said property has been treated as the property of the state and no taxes assessed against the same, and that therefore there were none to pay, and as to whether the Territory of Washington and the State of Washington have never sold or conveyed to any one any interest in said property,
20 these plaintiffs deny having any knowledge or information sufficient to form a belief and therefore deny the same.

IV.

For reply to defendant's further and second affirmative defense:

I.

For reply to paragraph I of defendant's further and affirmative defense, these plaintiffs deny each and every allegation in said paragraph contained not herein specifically admitted. Plaintiffs admit that the Territory of Washington was in possession of a portion of the property described in said deed of release, from the time of taking possession of the same shortly subsequent to the signing of the said deed of release, until on or about the 11th day of November, 1889, but allege that such possession was not adverse nor under color of title, but was as the tenant at will of Edmund Sylvester and these plaintiffs, and that on or about the said last mentioned date, the State of Washington entered into the possession of said land, which possession was neither adverse nor under color of title but as the tenant at will of these plaintiffs, and so held such possession until on or about the 21st day of March, 1893, and thereafter entered into possession of said land and held the same under the terms and conditions of a certain deed from these plaintiffs to the State of Washington hereinafter in plaintiffs affirmative reply set out, until the State of Washington abandoned said land and removed its property therefrom, and ceased to use and occupy said land for any purpose whatever, as hereinafter in this reply set out. Plaintiffs admit that said Edmund Sylvester acquired title to said property directly
21 from the United States under and by virtue of the federal statutes, and admit the signing of a deed of release to the Territory of Washington on or about January 18th, 1855.

IV.

For reply to paragraph III of defendant's further and second affirmative defense, these plaintiffs admit that they have not brought action within seven years after the Territory of Washington entered

into possession of said land, or within seven years after the defendant, the State of Washington, entered into possession of said land, for the reason in this reply set out.

For reply to paragraph I of defendant's counter-claim, these plaintiffs deny each and every allegation in said paragraph I contained not herein expressly admitted. Plaintiffs admit that there rests upon a portion of the land described in plaintiffs' complaint a part of foundation walls upon which some superstructure was intended to be placed, erected at large expense, but deny that the same are permanent or any improvements, deny that they are of any value to the land, or to these plaintiffs, and deny that they were erected at the expense of the State of Washington, or were paid for by the State of Washington, but allege that they were the proceeds of the sale or incumbrance or negotiation of lands donated by the government of the United States to the State of Washington for the purpose of erecting a capitol building for the State of Washington.

And by way of affirmative reply to the answer, the further
22 answer and first affirmative defense, the further and second affirmative defense, the counterclaim, and new matter set forth in defendant's answer, plaintiffs allege:

1.

Section 13 of Act of Congress, entitled, "Act to establish the Territorial Government of Washington," approved March 2, 1853, commonly known as the Organic Act, provided that the legislative assembly of Washington Territory should proceed to locate and establish the seat of government for said Territory, and $5,000.00 were appropriated for the erection of suitable buildings at the seat of government.

2.

Whereupon Edmund Sylvester and Clara E. Sylvester, his wife, offered the officers of the Territory of Washington and the members of the legislative Assembly of the Territory of Washington, then in session, for use as a site for the seat of government, ten acres of land lying within his claim, free of all expense so long as the same should be so used and the Territorial capitol building should be erected and maintained thereon, being the same condition formally incorporated in the deed of March 21st, 1893, from these plaintiffs to the State of Washington, hereinafter set out.

3.

This offer or contract was accepted and agreed to by the Territorial officers and the members of the legislature of the Territory of Washington, and there was passed on January 9th, 1855, the following act of the Legislative Assembly of the Territory of Washington, found on page 5 of the laws of Washington Territory, 1854-5, to-wit:

23 "An Act to provide for the Selection of the place for the location of the Seat of Government of the Territory of Washington.

SEC. 1. Seat of Government located on the land claim of Edmund Sylvester; lot described.

SEC. 2. When this act to take effect; Proviso.

SEC. 1. Be — enacted by the Legislative Assembly of the Territory of Washington,

That the seat of government of the Territory be, and hereby is established and located on a certain piece of land on the land claim of Edmund Sylvester, in the County of Thurston, in section twenty-three, township eighteen north, range two west, containing ten acres, and more particularly described as follows: Commencing at a point south twenty-four degrees, twenty-three min. west, nineteen and two one-hundredths chains from the northwest corner of Main and Union Streets, in the Town of Olympia; thence south seven and fifty-one hundredths chains; thence west eight and fifty eight hundredths chains; thence north, forty seven deg. west, one and seventy three hundredths chains; thence north, forty eight deg. thirty min. west, one and sixty hundredths chains; thence north sixty five deg. west one and ninety three hundredths chains; thence north thirty three deg. and thirty min. west, two and eighty hundredths chains; thence north thirty eight deg. west, one and seventeen hundredths chains; thence north forty-five deg. west, one and eighty seven hundredths chains thence east sixteen and four hundredths chains, to place of beginning.

SEC. 2. This act to take effect and be in force fifteen days after its passage; provided that within the time the present owners or claimants give a deed of release for the above described ten acres of land to the Territory of Washington without expense to said Territory, which shall be deemed satisfactory by a joint committee to be appointed by both branches of the Legislative Assembly to examine and receive the same.

Passed January 9, 1855."

4.

Whereupon, on January 18th, 1855, at the request of said Territorial officers and a select Committee of said legislature a deed of release, was signed by Edmund Sylvester and Clara E., his wife, which deed was not executed by law, and was never delivered to the grantee.

5.

At the date of said deed of release, said Edmund Sylvester was a claimant for three hundred and twenty acres of land embraced within

Amended, p. 80. the public lands of the United States, [and]* but not had filed his notification [No. 44]* therefor, [before the Surveyor General of Oregon,]* the said land

[* Words and figures enclosed in brackets erased in copy.]

24 being unsurveyed, and embracing within the limits the town or village of Olympia, and the land in litigation herein, but had no vested legal or equitable title thereto, not having complied with all the provisions of the Donation Act, and not being qualified grantee, and had not made final proof, had not paid the fee due upon said land entry, and had not caused the said land to be surveyed, and had neither received a donation certificate for said land nor a patent thereof, and his right to the land covered by said notification was in dispute and under contest, by reason of which, and other facts, he could not and did not convey any title to the Territory, or to any one else, and said deed of release was invalid and void and unlawful, and did not *convey* title, nor color of title, the making of such a deed being prohibited by statute, by the terms of the Donations Act, and being opposed to public policy and general interest, all of which facts were generally known and all of which were well known to the officers of the Territory of Washington, and to the members of said legislative assembly of the Territory of Washington, who had full knowledge of his lack of title and the defects and objections to his title, and took possession of his land with full knowledge of their lack of title.

On January 29th, 1855, the Territory of Washington accepted the use of said land under the terms of the offer hereinbefore set forth and the Territorial legislative Assembly passed the following act, found on page 6 of the Laws of Washington Territory, 1854-5, to-wit:

"An act supplementary to and Explanatory of an act entitled 'An act to provide for the selection of the place of location of the Seat of Government of the Territory of Washington.'

25 SEC. 1. Repealing clause; original act to be in force.
SEC. 2. Certain deeds to be deposited with the Secretary; Governor to take possession of land donated by said deed; Proviso.
3. When this act to take effect.

SEC. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That so much of said act to which this is a supplement, as makes its going into effect within fifteen days after its passage, be and the same is hereby repealed; and the said law is hereby now declared to be in full force and effect.

SEC. 2. Be it enacted, that the quitclaim deeds of Edmund Sylvester and wife, and of Luman H. Calkins, quitclaiming and assigning to the Territory of Washington all their rights, title and interest of, in and to, the said parcel of land mentioned in said bill to which this is a supplement, and the bond of Calvin H. Hale and others to the Territory, be deposited in the office of the Secretary of the Territory of Washington, and that the Governor be instructed to take possession of the said ten acres of land, and hold possession thereof, for the use, benefit and behoof of the Territory of Washington, in accordance with the first section of the act to which this is a supplement; And, Provided, that no improvements shall be commenced on

that portion of said parcel of land claimed by Lumon H. Calkins until the condition of the bond of Calvin H. Hale and other- has been fully complied with.

SEC. 3. This act to take effect, and be in force from and after its passage.

Passed January 28, 1855."

7.

The Governor of Washington Territory thereafter took possession of a portion of the ten acres in suit, for the use of the Territory, and in order to carry out the conditions under which the Territory was to use the same, commissioners were appointed to disburse the five thousand dollars appropriated by the Government of the United States for the erection of public buildings at the seat of government, and a temporary wooden building was erected upon said ten acres, and used as the seat of government, and the Territorial Library, papers, archives, records, and property of the Territory of Washington were placed therein, the terms of the Supreme Court,
26 which by the provisions of the Organic Act were required to be held at the seat of government, were held in said building, and the sessions of the legislative assembly of the Territory of Washington were held in said building, and said land was used as the seat of government and for the purposes and according to the conditions of said offer of said Edmund Sylvester hereinbefore set out until the 11th day of November, 1889, or thereabouts.

7.

That on the 1st day of July, 1858, said Edmund Sylvester made final proof upon his land claim, before proper officers of the land department of the government of the United States at the Olympia Land Office, Washington Territory, and donation certificate covering said ten acres, with other land, was thereupon duly issued to him by the Register and Receiver of said Land Office. That neither at said time nor any other time was there ever any adverse claim or contest to the land described in plaintiffs' complaint, or any portion thereof, made by or on behalf of said Territory of Washington.

8.

On May 3rd, 1860, the government of the United States duly issued its letters patent to said Edmund Sylvester, which patent covers the land in suit, and other land, and is in the following words and figures, to-wit:

27 THE UNITED STATES OF AMERICA:

To all — whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a certificate numbered seventy three of the Register and Receiver at Olympia, Washington Territory, whereby it appears that under the provisions of the Act of Congress approved the 27th day of September, 1850, entitled, "An act to create the office of

Surveyor General of the Public Lands of Oregon, and to provide for the survey and to make donations to settlers of the said Public lands," the claim of Edmund Sylvester, of Thurston County, Washington Territory, Notification No. 44 has been established to a donation of one-half section or three hundred and twenty acres of land, and that the same has been surveyed and designated as Claim No. 47, and as parts of Sections fourteen and twenty three in Township eighteen North of Range two West, according to the official plat of Survey returned to the General Land Office by the Surveyor General said claim as shown by the diagram hereto annexed being bounded and described as follows, to-wit:

Beginning on the east side of Budd's inlet, at the corner to fractional sections Fourteen and twenty-three, in Township Eighteen North, of range Two west, thence with the meanders of said section fourteen north, three degrees west forty chains and fifteen links—north forty-two degrees thirty minutes east, twenty chains—South forty-six degrees east, twenty-five chains and eighteen links—thence the variation being twenty one degrees east, south seventy eight chains and thirty-one links—thence west forty-one chains—thence with the meander line of section twenty-three north five degrees thirty minutes west three chains, north twenty-five degrees forty-five min. West, five chains and thirteen links—north four degrees and thirty minutes west six chains and thirty links—North nineteen deg. west eleven chains and fifty-three links—north eight degrees fifteen min. west four chains and fifty seven links—North sixty five deg. fifteen min. East twenty-one chains and ten links, and north three degrees west, three chains and thirty links to the place of beginning in the district of lands subject to sale at Olympia, Washington Territory, containing three hundred and twenty acres.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the provisions of the act aforesaid have given and granted and by these presents do give and grant unto the said Edmund Sylvester the tract of land above described.

To have and to hold the said tract with the appurtenances unto the said Edmund Sylvester and to his heirs and assigns forever.

In testimony whereof, I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land office to be hereunto affixed.

Given under my hand at the City of Washington, this third day of May, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the eighty-fourth.

By the President.

JAMES BUCHANAN,
By J. B. LEONARD, *Secretary.*

28 [Seal of General Land Office.]

I. N. GRANGER,
Recorder of the General Land Office.

Recorded Vol. 1, page 461.

Which said patent was duly filed for record in the office of the auditor of Thurston County, Wash. Ter., and duly recorded in Vol. 10 of the deed records of said county, at page- 209 and 210.

And thereupon and thereby said Edmund Sylvester became seized in fee and the owner of all the land described in said patent.

9.

On the 20th day of September, 1887, Edmund Sylvester departed this life, leaving surviving, as his sole heirs at law, his widow, Clara E. Sylvester, and his only child, May L., the plaintiffs herein, and leaving no debts or claims against his estate, or any necessity for administration thereof, and never having conveyed or incumbered the ten acres of land described in plaintiffs' complaint after receiving patent from the United States.

10.

After the State of Washington had been admitted to the Union, it for a time continued to occupy and use the tract of land in litigation herein as the seat of government, as had been done by the Territory of Washington, complying with the conditions upon which the use of the land had been offered, hereinbefore set out. The act of Congress, approved February 22nd, 1889, commonly known as the enabling act, having granted to the State of Washington 132,000 acres of the unappropriated public lands of the United States lying within the state's boundaries, the purpose of the act being to secure the erection of a suitable state capitol building at the capital of the state out of the land granted without burdening the treasury of the state, the donor not designating the manner in which the proceeds of the land should be realized upon, and leaving — the con-
20 trol of the legislature of the state the disposition of the proceeds of the land, the legislature of the State of Washington passed an Act entitled, "An act to provide for the location and erection of a capitol building and providing for an appropriation thereof, and declaring an emergency," which act as passed by said legislature is found at page 462 of the session laws of the State of Washington, 1893. That by the terms of said act the state's attorney general was made the legal adviser of the board of capitol commissioners to whom the legislature had given the business of erecting a said building, and by the constitution and laws of the State of Washington, the Attorney General of the State is made the legal adviser of the officers of the state, and it is his duty to prepare proper contracts and other writing relating to subjects in which the state is interested, and to give written opinions upon all legal questions in which the State is interested, and perform any other duties that may be required of him. The condition under which the Territory used and occupied the ten acres in controversy, and the nature of its tenure and lack of legal title to the same, being well known to the public generally and to the officers of the State of Washington, the said attorney general made and rendered an opinion advising the officers of the State to secure a conveyance from these plaintiffs, as the heirs of

Edmund Sylvester, the patentee to said land from the United States. Whereupon, and on March 21st, 1893, and before the said act of the legislature had been approved by the governor of the state, the defendant, the State of Washington, through its officers and agents, duly authorized thereto, prepared for execution by these
30 plaintiffs, and solicited and requested these plaintiffs to execute a deed which would convey to the state the title in fee of said ten acres upon which the state was proposing to have erected a capitol building from the proceeds of lands granted to it, as aforesaid, which deed recognized the terms under which said lands had been used heretofore, and embodied therein the express conditions upon which the land should be held and used by the state, which conditions were identical in substance as those agreed upon by Edmund Sylvester and wife and the Territory of Washington and its officers prior to the taking possession of and using said land, and the subsequent performance of which conditions was the real, sole and only consideration which Edmund Sylvester and wife received from the Territory of Washington for the use of said land and for the signing of the written deed of release said officers of the State of Washington promising and representing to plaintiffs that the State would perform the conditions expressed in the deed, and would erect a magnificent capitol building to cost many thousands of dollars upon said land, which would greatly benefit and enhance the value of property closely contiguous to said capitol site, then owned by these plaintiffs, which promises, representations and agreements these plaintiffs believed, relied upon, and were thereby induced and did execute said deed, as requested and thereby conveyed the title in fee to the land described in plaintiffs complaint to the state, and delivered said deed to the officers of the state, which deed is in the following words and figures, to-wit:

This Indenture, made the 21st day of March, A. D. 1893, by and between Clara E. Sylvester, widow and daughter, and sole
31 heirs of Edmund Sylvester, deceased, parties of the first part, and the State of Washington, party of the second part.

Witnesseth: That said parties of the first part, in consideration of one dollar, to them paid by the party of the second part, the receipt of which is hereby acknowledged, having granted, bargained, sold and conveyed, and quitclaimed, and by these presents do grant, bargain, sell, convey and confirm and quitclaim to said State of Washington, party of the second part, all that tract of land lying and being in the County of Thurston, and State of Washington, bounded and described as follows:

Commencing at a point south twenty-four (24) degrees, twenty-three (23) minutes west, nineteen (19) and ten (10) one-hundredths chains from the northwest corner of Main and Union Streets, in the City of Olympia, County of Thurston; thence south seven chains and fifty links; thence west eight chains and fifty-eight links; thence north forty-seven degrees west one chain and seventy three links; thence north forty-eight degrees thirty minutes west one chain and sixty links; thence north sixty-five degrees west one chain and ninety three links; thence north thirty-three

degrees thirty minutes west two chains and eighty links; thence north thirty-eight degrees west one chain and seventeen links; thence north forty-five degrees west one chain and eighty-seven links; thence east sixteen chains and four links to place of beginning; all containing ten acres more or less, and being a part of donation Claim No. 47 of Edmund Sylvester, and being the same land described in a certain deed to the Territory of Washington, of date January 18th, 1855, from Edmund Sylvester and Clara E. Sylvester, his wife, which deed was duly filed in the office
32 of the County auditor of said Thurston County on the 26th day of April, 1858, and recorded in Vol. 3 of Deeds, at page 34.

To have and to hold the above entitled premises, to and for the use, as below specified, of said State of Washington, party of the second part, its successors and assigns forever, free and of any claim of the said parties of the first part, or any of them, their and each of their heirs and assigns; Provided, however, and this deed is made and accepted upon the express condition that said tract shall be and remain the site of the Capitol of Washington, and that in the event of the location of the capitol elsewhere than upon said tract these presents shall be null and void.

(Signed MAY L. SYLVESTER. [SEAL.]
CLARA E. SYLVESTER. [SEAL.]

Signed, sealed and delivered in the presence of
LOUISE AYER.
C. S. REINHART.

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, clerk of the Supreme Court of the State of Washington, duly qualified and sworn, do hereby certify that on this 22nd day of March, 1893, personally appeared before me the within named Clara E. Sylvester (widow) and May L. Sylvester (unmarried) to me known to be the individuals described in and who executed the within instrument and acknowledged that they each signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 22nd day of March, 1893.

C. S. REINHART.
Clerk (Clerk of the Supreme Court of Washington).

which deed was on May 3rd, 1893, duly filed for record in the office of the auditor of said Thurston County, Washington and duly recorded in Vol. 35 of the deed records of said County, at page 363.

Thereupon, the defendant, the State of Washington, took
33 possession of said ten acres as owner of the fee, under the terms and conditions in the said deed of March 21st, 1893, and proceeded to begin the construction of a foundation for said State capitol building, and made excavations in and caused to be

placed upon said premises massive stone blocks, in rows, designed to support a portion of the superstructure of a colossal capitol building, a portion of which rested upon the ten acres in suit therein, and the remaining portion rested upon a tract of land lying north of the same, which said incumbrances, together with sand, broken rock, gravel, and other building debris, are not permanent in their character, but may be removed without injury to the freehold, which foundation is unfinished, unroofed and incomplete, and a portion of which has been temporarily and roughly roofed over by the present tenant of said ten acres and used as a shelter for his horses and cows, and the same have been stabled therein, all of which constitutes a nuisance to said plaintiffs and injury to said land, preventing the cultivation of the soil, and the free and full enjoyment of the said premises for all present and future uses for which they are adapted, and all ordinary uses thereof by plaintiffs or any private person or corporation and which are of no benefit to the premises, and greatly depreciate the rental value or selling price thereof, and that by reason thereof and the wrongful withholding of said lands and the deprivation of the rents and profits thereof these plaintiffs have been and are damaged far more than the value of said building materials so deposited as aforesaid.

34 12.

That on March 1st, 1901, the legislature of the State of Washington passed an Act providing for the purchase and completion of a State Capitol Building, which act is found in page 54 of the Laws of Washington, 1901, and is in the following words and figures, to-wit:

"An act providing for the purchase and completing and furnishing of a State Capitol Building, and providing for the payment of interest, and making an appropriation.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The State Capitol Commission is hereby fully authorized and directed to purchase from Thurston County, Washington, in the manner provided by law, and Thurston County is fully authorized to sell to the State of Washington, in the manner provided by law through the State Capitol Commission the county court-house and grounds now owned and used by said Thurston County in the City of Olympia, at a price not to exceed one hundred and seventy thousand dollars, and upon such purchase being made by the State Capitol Commission, the same shall be used, together with such additions thereto as may be erected, as the capitol building of the State of Washington. The expense of purchasing said court house and grounds and the erection of any additions and the furnishings of the same shall not exceed three hundred and fifty thousand dollars.

SECTION 2. In case said Capitol Commission shall purchase the said court house and grounds, it shall purchase such other grounds adjoining said court house as may be necessary, and add to said court house, a House and Senate chamber and committee rooms, and such further additions as are necessary to fit it for the use of the

state—said additions to be of the same general design, material and architecture as said court house now is, and for that purpose may expend any remaining portion of the appropriation made by this act, after paying for the said Thurston County court house and grounds. Said house and senate chamber and committee rooms shall be ready for occupancy for the Legislature of the State of Washington when it assembles January, 1903.

SECTION 3. The State Capitol Commission shall not proceed herein in the purchase, construction or completion of said capitol building until the warrants upon the state capitol fund for the entire amount herein appropriated in the sum of three hundred and fifty thousand dollars, are sold at not less than par, and the proceeds thereof placed with the treasurer of the State.

SECTION 4. In case the court house and grounds are purchased by the state as aforesaid, the bonds of Thurston County, held in the permanent school fund of the state, shall be surrendered to said Thurston County, as a part of the purchase price thereof, the full amount of said bonds shall be replaced in the permanent school fund and the interest due thereon shall be placed in the current school fund, and the entire amount of both principal and interest shall be taken out of the appropriation made by this act before said bonds and the interest thereon shall be surrendered.

SECTION 5. In order to carry out the provisions of this act the State Capitol Commission is hereby empowered to enter into such agreement with an architect to be selected for the furnishing and purchasing of such plans for any additions to said court house as shall guarantee the cost of building and furnishing said capitol building within the limit herein specified; upon the submission and acceptance of said plans, said capitol Commission shall proceed to advertise for bids for the construction of said additions with such limitations as to time and notice they shall provide.

SECTION 6. In order to facilitate the sale of warrants and prevent the sacrifice of the state lands donated by the general government for the purpose of erecting a capitol building, the State of Washington hereby guarantees the interest on warrants hereafter issued for the purchase, completion and furnishing of said building: Provided, however, That said interest shall not exceed five per cent. per annum, and be due and payable annually upon the first day of April of each year, upon the presentation of the warrants at the office of the State Treasurer.

SECTION 7. That the sum of seventeen thousand five hundred dollars, or so much thereof as may be needed is hereby appropriated out of the general fund for the purpose of paying the interest upon said warrants, all interest paid as aforesaid, to be returned to the general fund next after the payment of the appropriation heretofore and herein made, from the proceeds of the sale of lands granted to the state for the purpose of erecting public buildings at the state capital: Provided, that the guaranty of interest on warrants as herein provided in section 6 of this act, shall not apply to warrants heretofore issued upon the state capitol building fund.

SECTION 8. There is hereby appropriated out of the state capitol

building fund, for the purchase, completion and furnishing of said building; and all expenses incident thereto, the sum of three hundred and fifty thousand dollars, or so much thereof as may be necessary, and all the unexpended portion of the nine hundred and thirty thousand dollars heretofore made out of said capitol building fund, is hereby repealed, and this appropriation is to stand in lieu of such unexpended appropriation.

Passed the Senate February 7, 1901.

Passed the House March 1, 1901.

Approved by the governor March 2, 1901."

That the provisions of said act were thereafter carried out and said Thurston county court house and grounds were purchased, completed, furnished and occupied by the State.

13.

At the same session of the state legislature there was also appropriated the sum of fifteen hundred dollars for the removal of the state's property from its quarters to the new capitol building, (Laws of Washington, 1901, p. 127.) and also appropriated the sum
36 of two thousand dollars for the maintenance of the new state capitol. (Laws of Washington, 1901, p. 127.) which sums were expended in accordance with the provisions of said act and the state's property removed to the new capitol site.

14.

On March 12th, 1903, the Legislature of the State of Washington, passed an act for the completion of the state capitol building, which act is found on page 348, Laws of Washington, 1903, and is in the words and figures following, to-wit:

"An act appropriating money for the erection, completion, furnishing and finishing of the State Capitol building and grounds, and for the payment of extra claims of the contractors, and guaranteeing the payment of interest on warrants drawn on the Capitol Building fund.

Be it enacted by the legislature of the State of Washington:

SEC. 1. That there be and is hereby appropriated out of the State capitol commission fund the sum of $97,067.46, or as much thereof as may be in said treasury unexpended of the appropriation of $350,000.00 from the capitol building fund, made March 2, 1901, for which warrants were sold and the proceeds credited to the State Capitol commission fund, said sum or sums to be paid upon the presentation of vouchers approved by the State capitol commission.

SEC. 2. That there be and is hereby appropriated out of the State capitol building fund the sum of $101,500, $25,000.00 of which said sum or so much thereof as may be necessary shall be used for the payment of any sum or sums, if any, that may be found to be due to contractors on account of extras, if any, under contracts with the State Capitol commission for the erection and completion of the State Capitol Annex: Provided, that no part of said sum hereby appropriated shall be paid except on judgment obtained; $35,000 of

which said sum shall be used for furnishing said capitol building and ground in the following particulars: For cement floors and wood finish for basement, cement walks around capitol, for grading and filling and for stay wall with coping on south side, for revarnishing old building, formerly Thurston County court house, and paper new building, for electric fixtures, dynamo and electric light plant, tanks and engine for running elevator for the annex; $25,000.00 of said sum to be used for vault furniture and fixtures for said building; $15,000.00 for modern ventilating and heating apparatus; $1500.00 for the payment of the costs and expenses incurred in the defense of the State against the F. H. Goss Construction Company, all said money to be paid out on vouchers approved by the State Capitol commission.

37 SEC. 3. In order to facilitate the sale of warrants and prevent the sacrifice of the State lands donated by the general government for the purpose of erecting public buildings at the State capitol, the State of Washington hereby guarantees the payment of the interest on warrants issued upon the State Capitol building fund for the purposes mentioned in section 2 of this act; Provided, however, that said interest upon said warrants shall not exceed four per cent. per annum and the same shall be due and payable on the first day of April of each year upon the presentation of the warrants at the office of the State treasurer.

SEC. 4. In case any sum or sums shall be found to be due to any contractor on account of extras under contracts with the State Capitol Commission for the erection and completion of the State Capitol annex in whole or in part as provided in section 2 of this act the State capitol commission shall sell at not less than par and caused to be issued warrants upon the State capitol building fund for the amount or amounts so found to be due and the proceeds thereof shall be placed to the credit of the state capitol commission fund and paid out on vouchers approved by the state capitol commission.

SEC. 5. Before the State Capitol Commission shall proceed with the completion, finishing and furnishing of the State Capitol Building and grounds or incur any liability exceeding the said sums appropriated for that purpose in section 2 of this act, the said commisson shall ascertain as near as practicable the total amount necessary in addition to appropriations heretofore made to complete, finish and furnish said state capitol buildings and grounds not exceeding the said sums appropriated for that purpose in section 2 of this act and shall sell at not less than par warrants upon the State capitol building fund in an amount sufficient to fully complete, finish and furnish said capitol buildings and grounds not exceeding said sum so appropriated in section 2 of this act, the proceeds to be placed with the State Treasurer to the credit of the State capitol commission fund and paid out on vouchers approved by the State capitol commission.

SEC. 6. The State capitol commission is fully authorized and directed to complete, finish and furnish said capitol buildings and grounds and for that purpose to expend the said appropriated sums

in section 2 of this act or so much thereof as may be necessary in addition to all sums heretofore appropriated: Provided, That no deficiency, actual or constructive, shall be incurred for the completion of said building.

Passed the Senate March 6, 1903.

Passed the House March 12, 1903.

Approved by the Governor March 17, 1903.

15.

That the City of Olympia, by deed dated October 4th, 1901, filed for record October 18th, 1901, being deed numbered 21517, and which deed is of record book 47 of the Deed Records of Thurston County, Washington, at page 478, and which deed is in the following words and figures, to-wit:

38 This Indenture, made on this 4th day of October, nineteen hundred and one, at the City of Olympia, Thurston County, State of Washington, by and between the said City of Olympia, a municipal corporation, of the third class, duly incorporated under and by virtue of the laws of the said State of Washington party of the second part,

Witnesseth: That, whereas, on the sixteenth day of September, 1901, the City Council of the City of Olympia passed Ordinance No. 725, entitled, "An ordinance providing for the granting of Sylvester park to the State of Washington for use as part of the Capitol grounds stating conditions and limitations," which said ordinance is on file and of record in the office of the City Clerk of said City of Olympia, and

Whereas, by the terms of said ordinance herein referred to and made a part thereof the Mayor and the Clerk of the City of Olympia are empowered and directed to execute a deed of conveyance of said Sylvester Park;

Now, therefore, for and in consideration of the sum of one dollar, the receipt of which is herein acknowledged to have been paid to the said party of the first part, and the further consideration of the public benefits to accrue to the said City of Olympia, party of the first part hereby sells, grants and conveys unto the State of Washington, the said party of the second part, all of its right, title and interest in and to block numbered sixteen (16) of Sylvester's Plat of the City of Olympia, now owned by said City of Olympia and in use as a public park, subject to the following conditions, to-wit:

In case the said State of Washington should at any time in the future cease to use and hold said block numbered 16 and the block numbered 26 of said Sylvester Plat of the City of Olympia, or either of them for State Capitol purposes, in accordance with the true intent and spirit of said ordinance number 725, and of this instrument, then and in the event all right, title and interest of the State of Washington in and to said block 16 shall revert to the City of Olympia for public use and benefit.

In witness whereof, we, the undersigned, the Mayor and the City

Clerk respectively, have hereunto set our hands and seals on this the 4th day of October, A. D. 1901.

C. S. REINHART, *Mayor.*
D. K. PROUD, *City Clerk.*

Witnesses:
HELEN WILDER.
M. G. ROYAL.

[Seal of the City of Olympia, Washington.]

STATE OF WASHINGTON,
County of Thurston, ss:

This certifies that on this the fourth day of October, A. D. 1901, before me, a notary public in and for Thurston County, State of Washington, personally appeared the within named C. S. Reinhart, Mayor of the City of Olympia, Thurston County, Washington, and D. K. Proud, City Clerk of Olympia, whose names are subscribed to the foregoing instrument as parties thereto for and on behalf of said City of Olympia, and that they are personally known to me to be the persons described in and who signed the instrument and acknowledged the same to be their free act and deed for
39 the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

M. G. ROYAL,
Notary Public in and for the State of Washington, residing at Olympia, Wash.

[Seal of M. G. Royal. Commission expires July 19, 1903.]"

has attempted to convey to the State of Washington, under the terms and conditions in said ordinance set out, and under the conditions therein and in said deed contained, a public park of the town of Olympia, known as Sylvester Park designated in the above deed as block 16, so long as the state shall use both said park and block 26 of the town of Olympia, which is the Thurston County court house site for state capitol purposes, which park lies to the west and contiguous to said old Thurston County court house site, purchased by the State of Washington under the terms of the act of March 1, 1901, above set out, and the name of Sylvester Park, which was named after Edmund Sylvester, has been changed to Capitol Park, and said State has accepted said public park under the conditions expressed in said ordinance and deed now holds and occupies said park as a part of its capitol site.

16.

That on or about the 12th day of January, 1903, the State of Washington abandoned said ten acres, described in plaintiffs' complaint, as a capitol site and as the seat of government. On or about said date, the legislature of the State of Washington convened in a building on the corner of Seventh and Jefferson Streets, in the

City of Olympia, formerly known as the Farhuhar Building, and since known as the Lobby, and held its sessions during the
40 entire term in said building. That the subsequent sessions of the legislature of the State of Washington have not been held upon the land in suit, or any other use of said land been made since its abandonment, the state's property has been removed from said land, and placed in the capitol site of the state of Washington situated on the old Thurston County court house site, and all the departments of the state government are now housed in said capitol building on the courthouse site, the state has accepted said building from the contractor, and now uses same as and the same is now the seat of government and capitol site of the state, and the land in suit is not now used and is not now the capitol site nor seat of government of the Territory of Washington nor of the State of Washington, but said tract of ten acres in suit has been abandoned by the state and by the territory, and the State of Washington has erected and located its capitol elsewhere than upon the said ten acres, and at a distance so remote as to deprive the property of Plaintiffs contiguous to the old site of any enhancement in value, and the State of Washington does not intend to resume its occupation or use of said land for any purpose, and the conditions upon which the ten acres were deeded to the State have been broken and the land and all right thereto by the state has been forfeited, and said deed to the state is null and of no force or effect, and all right, title and interest of the territory of Washington and of the State of Washington have ceased and been terminated.

17.

That by reason of the inducements, solicitations and request and promises and representations made to these plaintiffs as aforesaid and the acceptance of the deed of March 21, 1893, contain-
41 ing the express and specific conditions therein set forth, and the acceptance of the benefits derived therefrom, and the oral agreement between said Edmund Sylvester and wife and the territory of Washington, and the long course of dealing and conduct of the Territory and State, and the recognition of the legal title of said Edmund Sylvester and of these plaintiffs, and the condition under which said deed of release was executed, and the knowledge of the lack of legal title by Edmund Sylvester and wife at the date of said deed of release to the territory, and until the issuance of patent to him, and the lack of any consideration for said deeds other than the conditions herein specified, and by reason of the abandonment of said ten acres by the state, and all the other facts and circumstances above set out, the defendant, the State of Washington is estopped from claiming that the deed of release signed by Edmund Sylvester and wife conveyed good and sufficient or any title, and from claiming that the defendant now has any right title or interest to the land in suit, which is no longer in possession of except such possession as it has through its pretended tenants, A. B. Allison and wife and from claiming that the possession of the Territory or that the State prior to the deed of March 21st, 1893, was adverse to

these plaintiffs or under color of title, or claiming that the possession of the defendant, the State of Washington, from and after the 21st day of March, 1893, and the acceptance of the deed of that date was other than under and by virtue of the provisions and conditions of said deed of March 21, 1893.

18.

That by the provisions of the Act of March 2, 1853, com-
42 monly known as the Organic Act, that portion of Oregon Territory south of the 49th degree north latitude and north of the middle of the main channel of the Columbia River from its mouth to where the 46th degree of north latitude crosses said river, near Fort Walla Walla, thence with the 46th degree of latitude to the summit of the Rocky Mts., was organized into a temporary and provisional government, by the name of Washington Territory, having only the powers granted by said organic act, and under the Constitution, laws, decisions and form of government of the United States, the government of the United States retained the title to all land embraced within the said Territorial limits, and the territory of Washington was not empowered, authorized or permitted to acquire or hold the title in fee to any lands within the boundaries or the title to any lands of the United States, and no provision of law existed whereby the Territory of Washington could acquire or hold title to the ten acres in suit under said deed of release from Edmund Sylvester and wife, or otherwise, the said land being at said time public, unsurveyed, unappropriated land of the United States, not disposed of; and the legislature of the Territory of Washington was prohibited by the terms of said organic Act from passing any law interfering with the primary disposal of the soil within the boundaries of said provisional and temporary government of Washington Territory, and any laws inconsistent with the Constitution of the United States.

19.

That during all the time in which the territory of Washington held possession of the land in suit there was no court having
43 competent jurisdiction to hear and determine suits against the Territory of Washington for the recovery of possession of land withheld by it, and that until after the defendant the State of Washington, had taken possession of the land in suit, under the deed of March 21, 1893, there was no court having competent jurisdiction to hear and determine suits against the State of Washington for the recovery of the possession of land withheld by the State, and therefore, the statute of limitations did not run against these plaintiffs, and the Territory of Washington having kept and performed the condition upon which the use of the land was granted to it under the terms of said oral agreement, during the entire term of its existence, no cause of action accrued to Edmund Sylvester or these plaintiffs, from any breach of the conditions of the tenure of said land, and the statute of limitations did not begin to run, and the right of action by these plaintiffs against the State of Wash-

ington did not arise until its abandonment of said lands, and the breach of the conditions in the deed of March 21, 1893, and these plaintiffs are not barred by the statute of limitations, or otherwise.

20.

That there is drawn in question herein the validity of a statute of, or an authority exercised under the United States, and the validity of the statute or an authority exercised under the State of Washington, on the ground of their being repugnant to the Constitution, laws and decisions of the United States; and the title, right, privilege or immunity or authority herein claimed, upon which the parties plaintiffs and defendant depend and which will be defeated by one construction and sustained by another construction,
44 arises under the Constitution, a statute of, or commission held by or authority exercised under the United States, and especially under and its determination will necessarily involve a construction of the provisions of the Act of September 27th 1850, entitled, "An act creating the office of Surveyor General of the public lands of Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," commonly known as the Oregon Donation Act, and of the Act of March 2, 1853, entitled, "An act to establish the Territorial Government of Washington," known as the Organic Act, and of the Fourteenth Amendment of the Constitution of the United States, and of Sec. 3 and 16 of Article I. of the Constitution of the State of Washington.

Wherefore plaintiffs pray judgment against the defendants Allison and wife as in their complaint prayed, and against the defendant, The State of Washington, substituted as defendant herein, that said defendant, The State of Washington, be decreed and adjudged to have no right, title or interest in or to the land described in plaintiffs' complaint herein, or any portion thereof, and that the plaintiffs be adjudged and decreed to be the legal and equitable owner in fee simple to said premises, and that plaintiffs be granted such other and further relief herein of any kind or character sufficient to declare them to be the owners in fee simple thereof, and entitled to the recovery thereof, and for their costs and disbursements herein.

GEORGE MARVIN SAVAGE,
MAY L. SYLVESTER,
Attorneys for Plaintiffs.

45–79 STATE OF WASHINGTON.
County of King, ss:

May L. Sylvester being first duly sworn, on oath deposes and says: That she has read the above and foregoing answer, knows the contents thereof and verily believes the same to be true.

MAY L. SYLVESTER.

Subscribed and sworn to before me this 19th day of May, 1905.

J. W. McBURNEY,
Notary Public in and for the State of Washington, Residing at Seattle.

Service accepted by copy this 10th day of July, 1905.
JOHN D. ATKINSON,
By BESSE SCOBEY.

(Indorsed:) Filed Superior Court Thurston County, Wash. July 10, 1905. B. T. Baker, Clerk.

* * * * * * *

80–89 In the Superior Court of the State of Washington for Thurston County.

No. —.

Mrs. CLARA E. SYLVESTER ET AL., Plaintiffs,
v.
THE STATE OF WASHINGTON, Substituted as Defendant for A. B. Allison *et ux.*, Defendant.

Order.

This cause coming on regularly to be heard this 28th day of November, 1905, on plaintiffs' motion for leave to amend paragraph 5 of their affirmative reply, as in their motion stated the plaintiffs being being represented by their attorneys, G. M. Savage and M. L. Sylvester, and the defendant, the State of Washington, being represented by its attorneys, A. J. Falknor and Robert Booth, whereupon the defendant, the State of Washington, by its said attorneys in open court consenting that leave be given plaintiffs to amend their reply as in said motion set out.

Said motion is hereby granted, and leave is hereby given the plaintiffs to amend paragraph 5 of their affirmative reply as in their said motion asked, so that said reply shall conform to the facts.

Done in open court this 28th day of November, 1905.
R. B. ALBERTSON, *Judge.*

(Indorsed:) Filed Superior Court Thurston Co. Wash. April 28, 1906. B. T. Baker, Clerk.

* * * * * * *

90 In the Superior Court of Washington in and for Thurston Co.

Mrs. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON (Substituted for A. B. Allison *et ux.*), Defendant.

Affidavit.

Geo. M. Savage being first duly sworn on his oath says: That ever since the beginning of the above entitled action he has been and now is an attorney of record in said action.

That at the trial the defendant through and by its attorney of record offered to admit that the Notification of Edmund Sylvester was filed and given in the Olympia Land Office. That relying on such admission and the knowledge affiant had of the facts, no evidence was offered by plaintiff to show that the Notification No. 44 which describes the Edmund Sylvester Donation Claim was not filed and given in the office of the Surveyor General of Oregon.

That plaintiffs were surprised when on the 1st day of May, 1906, defendant offered a finding to the Court finding that Edmund Sylvester had filed Notification No. 44 in the office of the Surveyor General of Oregon. That on the 22nd day of June, affiant received through the United States mail a certified copy of Notification No. 44 filed in the Office of the Surveyor General of Oregon and a description of the land taken by the settler under said notification, a copy whereof is hereto attached, hereby referred to and made a part hereof.

That on defendant's Exhibit *Ex* 3 at the bottom of that part of said exhibit entitled "Notification to the Surveyor General of Oregon" etc. there appears "Notification on Unsurveyed Land No. 454." Exhibit No. 3 was admitted in evidence over plaintiffs' objection, they challenging the correctness of said exhibit. That the
91 phrase "Notification on Unsurveyed land No. 454" does not appear on the same document which is a part of plaintiffs' exhibit 18, and plaintiff had no means of knowing that it would appear on defendant's exhibit.

That only after long search was plaintiffs able to show what Notification No. 454 Oregon Land Office was.

That affiant received through the United States Mail on the 22nd day of June, 1906, a copy of Notification No. 454 which is hereto attached marked Ex "B" made a part hereof.

G. M. SAVAGE.

STATE OF WASHINGTON,
County of King, ss:

George M. Savage being first duly sworn on oath says: That he has read the foregoing affidavit knows the contents thereof and believes the same to be true.

GEORGE M. SAVAGE.

Subscribed and sworn to before me this 22nd day of June, 1906.
[NOTARY SEAL.] ROBERT D. HAMLIN,
Notary Public for the State of Wash., Residing at Seattle.

92 454.

U. S. LAND OFFICE,
OREGON CITY, OREGON, *Sept.* 1*st*, 1879.

I, L. T. Barin, Register of the Land Office at Oregon City, Oregon, do hereby certify that the within copies of the Notification and proofs in Don. Claim of Geo. Riffe have been compared by me with the original proof, and that they are a correct transcript therefrom, and

of the whole of such original Notification No. 454 and proofs in said Claim.

L. T. BARIN, *Register.*

Sheet No. 2.

No. 454.

Notification to the Surveyor General of Oregon of Settlement on Public Land in Township 8 S., R. 3 W.

Pursuant to the act of Congress approved on the 27th day of September, 1850, entitled "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey and to make donations to settlers of the public lands," I, George Riffe of Marion Co. in the Territory of Oregon, hereby give notice of my claim to a Donation of 320 A. of land, known and designated in the surveys and plats of the United States as a part of sec. 5, 6, 7 & 8 in T. 8 S. R. 3 W., bounded and described as follows: beginning at a point 1178 chains East of the S. W. corner of Sec. 5, T. 8 S. R. 3 W., running thence North 23.50 chains, thence West 40.00 chains, thence South 80.00 chains, thence East 40.00 chains, thence North 56.50 chains to the place of beginning, containing 320 As. as appears by the annexed diagram marked 454.

Oregon City, 27 May 1852.

GEORGE RIFFE.

(In lead pencil is the following: "This land covered almost wholly by the Donation Claim of Thies S. Jeffies Certificate 4861
93 and was evidently abandoned by Riffe.")

No. 454.

Affidavit of Settler.

George Riff of Marion County in the Territory of Oregon, being first duly sworn, says that he is a white settler on the public lands in Oregon, and was a resident thereof on and before the 1st day of December eighteen hundred and fifty; and above the age of eighteen years on the 1st day of December, 1850, that he is a native born citizen of the United States, and that he was born in Casey County, Kentucky in the year 1828; that he has personally resided upon and cultivated that part of the public land in Oregon particularly described in Notification number 454 hereunto annexed continuously, from the 15 day of December, 1851, to the 27 day of May, 1852.

——— ———.

Subscribed and sworn to before me in Oregon City this 27 day of May, 1852.

JNO. B. PRESTON,
Sur. Gen'l of Or'g'n.

Sheet 4.

Alexander R. Stoughton of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by George Riffe, and particularly described in Notification Number 454, hereunto annexed; that he is personally acquainted with said George Riff, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 15 day of December, 1851, to the 27 day of May, 1852.

A. R. STOUGHTON.

Subscribed and sworn to before me this 27 day of May, 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

94 Sheet No. 4.

No. 454.

Oregon.

Form of Settler's Oath.

Claiming by Virtue of Settlement and Cultivation Commenced Subsequent to December 1, 1850.

I, George Riffe of Marion Co. Or'g'n, am a claimant of the public land described in the annexed Notification to the Surveyor General of public lands in Oregon, number 454, under the provisions of the act of Congress approved the 27th day of September, 1850, entitled "An act to create the office of Surveyor General of the Public Lands in Oregon, and to make donations to settlers of the said public lands;" and I do solemnly *swear* that I am not acting, directly or indirectly, as an agent for or in the employment of others in making such claim, but that the land so claimed by me is for my own use and cultivation, and that I have made no sale or transfer, or any arrangement or agreement for any sale, transfer, or alienation of the same, or by which the said land shall inure to the benefit of any other person.

GEORGE RIFFE.

Subscribed and sworn to before me in Oregon City this 27 day of May, 1852.

JNO. B. PRESTON,
Surveyor General of Public Lands in Oregon.

UNITED STATES LAND OFFICE,
PORTLAND, OREGON, *June* 19, 1906.

I, Algernon S. Dresser, Register of the United States Land Office at Portland, Oregon, do hereby certify that I have carefully com-

pared the attached copy of Notification No. 454 of Geo. Riffe and proofs thereof with the Notification No. 454 and proofs on file in this office, and that said attached copy is a full, true and correct copy of said Notification No. 454 and proofs on file and of the whole thereof.

ALGERNON S. DRESSER, *Register.*

95 "44."

Description of the Boundary of Wm. T. Patton's Claim of 640 Acres, Lying in Sections No. 8, 9, 4, and 10 of Township 8 South, Range 1 West, of the Willamette Meridian.

To find his corners go to the South East corner of Section 8 of township 8 South Range 1 west of the known meridian; thence West 13.70 chains; thence North 26.87 to his South west or beginning corner; thence West 37½ degrees North 5.17 chains; thence North 16 degrees East 80.50 chains; thence East 26.23 chains; thence South 48.57 chains; thence East 72.50; thence South 40 chains; thence west 109 chains to the beginning.

Sheet 2.

No. 44.

Notification to the Surveyor General of Oregon on the Settlement of Public Land in Township 8 S., Range 1 W.

Pursuant to the Act of Congress, approved on the 27th day of September, 1850, entitled, "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey and make Donations to Settlers of the public lands," I, William T. Patten, a married man, Marion Co. in the Territory of Oregon, hereby give notice of my claim to Donation of 640 acres of land, known and designated in the Surveys and Plats of the United States as a part of Sections 4, 5, 8, 9 & 10, in T. 8 S. R. 1 W. particularly described as follows: beginning at a point 26.89 chains north and 13.70 west of the S. East corner of section 8, T. 8 S. R. 1 W., running thence N. 63 degrees W. 5.17 chs. on Kimsey's line; thence N. 16 degrees E. 80.50 chs. to T. Powell's line, thence East 23.00 chs. to May Center's line; thence South 51.00 chs. to May Center's S. W. corner; thence East 70.00 chs. to W. Morley's claim; thence South 36.00 chs.; thence West 115.00 chs. along N. B. Wisdom's line to the place of beginning, containing 640 acres.

Oregon City, 25th February, 1852.

WILLIAM T. PATTEN.

96 W. 1/3 to the wife. C. K. G—.

Sheet 3.

No. 44. William T. Patten of Marion County, in the Territory of Oregon, being first duly sworn, says that he is a white settler on

public lands in Oregon, and was a resident thereof on and before the 1st day of December, 1850; and above the age of 18 years on the 1st day of December, 1850, that he is a native born citizen of the United States, and that he was born in Franklin Co. Missouri in the year 1828, that he has personally resided upon and cultivated that part of the public lands in Oregon particularly described in Notification No. 44, hereunto attached, continuously from the 1st day of November, 1850, to the 25 day of February, 1852, and he further says that he is intermarried with Julia Ann Patten, his wife, and that he was legally married to her on the 30th day of November, 1848, in Marion Co. Oregon.

WILLIAM T. PATTEN.

Subscribed and sworn — before — this 25 day of Feb'y, 1852, in Oregon City.

JNO. B. PRESTON,
Surv. Gen. of Oregon.

Sheet 4.

No. 44. Rufus C. Edmunson of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by William T. Patten and particularly described in Notification No. 44, hereunto annexed; that he is personally acquainted with said William T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 30th day of November, 1850, to the 25th day of February, 1852.

RUFUS C. EDMUNSON.

97 Subscribed and sworn to before me, this 25th day of February 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

No. 44. Reuben Dickens, of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by William T. Patten, and particularly described in Notification No. 44, hereunto annexed; that he is personally acquainted with said Wm. T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 30th day of Nov'r, 1850, to the 25th day of February, 1852.

REUBEN DICKENS.

Subscribed and sworn to before me this 25th day of Feb'y, 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen. of Oregon.

Sheet No. 5.

44. Reuben Dickens of Marion County, in the Territory of Oregon, being first duly sworn, says that he is personally acquainted

with William T Patten, the person who claims a donation right to the tract or tracts of land described in notification No. 44, and Julia Anne Patten, his wife; and that he has known them to live together as man and wife from December, 1848, to 25th February, 1852; and that they are and were reputed by their neighbors as such during said period.

REUBEN DICKENS.

Subscribed and sworn to before me this 25th day of February, 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

98 Sheet No. 6.

No. 44. William T. Patten of Marion County, in the Territory of Oregon, being first duly sworn, says that he is a white male settler on the public lands in Oregon, and was a resident thereof on & before the 1st day of December, 1850, and above the age of 18 years on the 1st day of December, 1850; that he is a native born citizen of the United States, and that he was born in Franklin county, Missouri in the year 1828, that he has personally resided upon and cultivated that part of the public land in Oregon particularly described in notification No. 44 hereunto annexed, continuously, from the 1st day of November, 1850, to the 28th day of November 1854. And he further says that he is intermarried with Julia Ann Patten, his wife, and that he was legally married to her on the 30th day of November, 1848, in Marion County, Oregon.

WILLIAM T. PATTEN.

Subscribed and sworn to before me in Salem, O. T., this 28th day of November, 1854.

C. K. GARDNER,
Sur. Gen'l of Oregon.

Sheet No. 7.

No. 44. Francis M. Smith of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by William T. Patten and particularly described in the annexed notification to the Surveyor General of Oregon; that he is personally acquainted with said Wm. T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 15th day of November, 1850, to the 28th day of November, 1854.

FRANCIS M. SMITH.

Subscribed and sworn to before me this 28th day of Nov'r, 1854, in Salem, O. T.

C. K. GARDNER,
Sur. Gen. of Oregon.

99 No. 44. Jesse Dickens of Marion County, in the territory of Oregon, being first duly sworn, says that he is in no way inter-

ested in the tract or tracts of land described as a donation by William T. Patten, and particularly described in the annexed notification to the Surveyor General of Oregon that he is personally acquainted with said Wm. T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 15th day of November, 1850, to the 28th day of November, 1854.

JESSE DICKENS.

Subscribed and sworn to before me this 28 day of Nov'r, 1854, in Salem, O. T.

C. K. GARDNER,
Sur. Gen. of Oregon.

Sheet No. 8.

Oregon.

Donation Certificate No. 269. Notification No. 44.

Whereas, in conformity with the provisions of the 7th Section of the Act of Congress, approved September 27, 1850, entitled "An Act to create the office of Surveyor General of the Public Lands of Oregon, and to provide for the survey, and to make Donations to settlers of the Public Lands" and amendments thereto,

William T. Patton of the County of Marion, in the Territory of Oregon, claiming a Donation Right in virtue of the Acts aforesaid, to the following tract of public lands, known and designated in the surveys and plats of the United States as the "Claim No. 73," being parts of Sections 4, 5, 8, 9 & 10 in Township Eight South of Range one west, bounded as follows: Beginning at a point 15.14 chains South and 13.85 chs. west of the West corner of the South West qr. of section 9, T. 8 S. R. 1 W.—thence North 2.14 chains; thence N. 63 degrees W. 3.76 chains; thence N. 16 degrees E. 88.47 chains; thence S. 89 deg. 42 min. E. 25.55 chains; thence South 51.00 chains; thence S. 89 deg. 30′ E. 26.37 chains; thence North 9.52 chains; thence S. 89 deg. 45′ E. 41.54 chains; thence S. 1 deg. W. 4.71 chains; thence South 43.75 chains; thence West 74.40 chains; thence North 1.40 chains; thence West 39.86 chains to the place of beginning, containing six hundred & forty two nine-hundredths acres, (642.09).

100

The west half to Julia Ann Patton, wife of said William T.; and the East half to William T. Patton,—having proven to the satisfaction of the Register and Receiver of the Land Office for the "Willamette District" in Oregon Territory, the fact that such settlement was commenced on the fifteenth day of November, in the year one thousand eight hundred and fifty (1850) more than four years prior to the date hereof; and having, pursuant to the requirements of the Act aforesaid, established by two disinterested witnesses the fact of continued residence and cultivation, required by the 4th Section of said Act; Now, therefore, Be it known, That we, R. Wilcox, Register, and James Guthrie, Jr., Receiver of the Land Office aforesaid, do hereby certify to the Commissioner of the General Land Office the facts aforesaid, accompanied by the evidences thereof, in order that a

patent may be issued to said claimants for the tract of land above described: Provided the said Commissioner shall find no valid objection thereto.

Given under our hands at the Land Office in Oregon City, this 28th day of June, 1855.

R. WILCOX, *Register.*
JAMES GUTHRIE, JR., *Receiver.*

UNITED STATES LAND OFFICE,
PORTLAND, OREGON, *June* 19, 1906.

I, Algernon S. Dresser, Register of the United States
101–15 Land Office at Portland, Oregon, do hereby certify that I have carefully compared the attached copy of Notification No. 44 of William T. Patten, the proofs of the same, and Certificate No. 269 issued thereon to said William T. Patten with the notification, proofs, and certificate on file in this land office, and that the attached copy is a full, true and correct copy of said Notification, proofs and Certificate on file herein and of the whole thereof.

ALGERNON S. DRESSER, *Register.*

* * * * * * *

16 ALLEN WEIR, called as a witness on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. FALKNOR:

Q. What is your name?
Ans. Allen Weir.
Q. What State official position have you held, Mr. Weir?
A. That of Secretary of State.
Q. When were you Secretary of State?
Ans. From 1889 to 1893.
Q. You are a native born citizen of this State?
A. No, of California.
Q. How long have you lived in this State?
Ans. Something over 45 years.
Q. How long have you been familiar with the capitol site in this city, being the land involved in this controversy?
A. For thirty years.
Q. How long, to your knowledge, has the State of Washington been in possession of that land?
Ans. As long as I have known it?
Q. All of the thirty years?
Ans. Yes, sir.
Q. Continuously?
Ans. Yes, sir.
Q. Openly?
Ans. Yes, sir.
Q. Exclusively?
Ans. As far as I know, I think exclusively, yes.

Cross-examination.

By Mr. SAVAGE:

Q. When did your term of office expire?
Ans. In January, 1893, I think it was.

(Witness excused.)

17 P. D. MOORE, called as a witness on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. FALKNOR:

Q. What is your name?
Ans. P. D. Moore.
Q. How long have you lived in Olympia, Mr. Moore?
A. Well, about all of the time since 1862.
Q. Are you familiar with the lands involved in this suit, being the old capitol site?
Ans. Well, yes, sir, I think I am.
Q. How long have you been familiar with that site?
A. Well, I have been more or less familiar with it ever since I have been out here, but especially so since the admission of the State. Of course, I knew the location of the ground and was on it a good deal prior to that time.
Q. Who has been in possession of that since you have been familiar with the location?
A. Well, the Territorial Government and Secretary of the Territory, and when the State was admitted and the State officers located their offices there when they took office. At that time I was appointed State Librarian under the administration of Governor Ferry, and during that time I was located in the old capitol building, and the Territory with its representatives met there during territorial days, and when the State was formed the State Senate and House of Representatives met there. The State Library was in the same building, and, under the law at that time, I had charge of the State grounds,—the capitol grounds. I had charge and supervision of that by virtue of my office as State Librarian.
Q. Now, Mr. Moore, how many years were you in charge of the grounds?
18 A. Well, I was in charge of the grounds about, to the best of my recollection, during my entire service as State Librarian, which was about five years.
Q. Was the possession of the State open?
A. Yes, sir; there was no question on that score. I thought that was known generally.
Q. There was exclusive possession on behalf of the State?
A. So far as I know, yes, sir.

Cross-examination.

By Mr. SAVAGE:

Q. When did you go out of office, Mr. Moore?

A. I went out of office during the term of Governor McGraw. I served through Ferry's administration and a portion of McGraw's, but can not tell exactly the date that I left, or went out of office.

Q. You are unable to recall the date?

Ans. I can't recall it.

Q. Give it as near as you can?

Ans. Well, I think that I was in office about nine months after Governor McGraw took office. I think it was sometime in August or September. At any rate it was in the Fall of the year.

Q. Where was the Territorial Library at the time you went out of office?

A. The time I went out of office it was, or during the time I was in office, it was removed to what is known as the "McKinney Block," on the corner of Main and Fourth Sts. of this city.

Q. What was that building used for?

A. The McKinney Building was used for the Supreme Court and the State Library, and the Governor had an office there, and
19 also the Attorney General, I think. And I think also the Secretary of State was there.

Q. Was the Treasurer there?

Ans. The Treasurer. Yes, sir. I think they all had their offices there.

Q. Where were the sessions of the Supreme Court held?

A. Held in that building when I was there.

Q. Did you have charge of the books of the Library when they were in the McKinney building?

A. Yes, sir; during the latter part of my administration it was in the McKinney Building.

Q. For what purpose did the State-Territory use the land while they occupied it and up to the time you went out of office during the time that you testified you knew of it?

A. Well, the legislature met there.

Q. As to the grounds that you had charge of?

Ans. Well, I sold the grass off the grounds when it was cut. Of course, the Secretary of State had charge of the building.

Q. Who had the grass cut in the *hay*?

Ans. Well, of course, the Secretary of State had charge of the matter, and supervision over me.

Q. What was it spoken of as by the officers and yourself?

A. Well, as the "old capitol grounds."

Q. Did they call it the "old capitol grounds" at that time?

A. Well, yes, sir. I don't know as they used the term "old." They may have some times, but it was called the "Capitol Grounds" or "Old Capitol Grounds."

Q. They used it for the capitol site at that time?

A. Yes, sir. The legislature met in the capitol building there.

Q. As the seat of government.

Ans. Yes, sir, that is as I understand it.

20–26 Q. Did you ever hear it spoken of, about the time of the McGraw administration, as the "proposed" capitol site?

A. No, I don't think I ever did hear it expressed as the "proposed" capitol site. It was always spoken of as the "capitol grounds." It was spoken of that way at the time the foundation was being built.

Q. They proposed to put up a capitol building there? It was during the McGraw administration, you say, and what at that time was the intention of the State?

A. To erect a capitol building there, and they started a foundation, or, at least, they built a foundation.

Q. Did you ever hear it spoken of as a site for the insane asylum, or anything of that kind?

Mr. FALKNOR: That is objected to as incompetent, irrelevant and immaterial.

(Objection sustained.)

Mr. SAVAGE: We offer to show by this witness that the State was occupying those premises, and that they kept it with the intention of doing what we contend was the consideration in the deed, that is, the construction of a capitol building there. That was the only object I had in asking the question.

COURT: I would think the facts about this proposition would be admitted by the parties. It is so well known that there can be no dispute about it.

Mr. SAVAGE: Very well, then.

(Witness excused.)

* * * * * * *

27 MILLARD LEMMON, called as a witness for the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. FALKNOR:

Q. What is your name?

Ans. Millard Lemmon.

Q. What is your business?

Ans. I am a surveyor.

Q. Are you familiar with the lands upon which the old Territorial capitol building is constructed in this city?

A. I am.

Q. Have you ever surveyed that?

Ans. I have.

Q. Have you surveyed that land with a view of locating the Territorial Building, and also the foundation on the land there?

A. Yes, sir.

Q. Have you made a plat showing the location of those buildings and the foundation?

Ans. I have.

Mr. FALKNOR: The State now offers for identification, State's Identification No. 1.

Q. I think, Mr. Lemmon, you may explain first what that is?

A. That is a plat showing the ten-acre tract acquired by the State, and the two-acres adjoining, making the twelve acres known as the "capitol grounds."

Mr. FALKNOR: We now offer this in evidence.

Mr. SAVAGE: We would object to the admission of the map. If your Honor please, it seems to me it is defective. There are no points of the compass shown.

COURT: Show the points of the compass on the map, if you can.

28 Q. Put the points of the compass on the map, and we will offer it again?

A. (Witness puts points of compass on the map.)

Q. Now, will you indicate, Mr. Lemmon, what and where the ten-acre tract is located on this plat or blue-print?

A. It occupies that portion. (Indicating.)

Q. Just show the point, indicating the ten-acre tract on the plat.

A. (Witness does so.) That area indicated within the limits designated by the initials A, B, C, and D, represents the ten-acre tract. And the two-acre tract joins it on the north. The tract embraced within the lines joining A, B, C and D, is the ten-acre tract, and the tract embraced within the lines joining, A, B, F and E, adjoining the ten-acre tract at the north, is the two acre tract.

Q. You have indicated on there what you have indicated as the "capitol foundation." What is that intended to represent?

A. The foundation that was constructed by the State.

Q. That represents the foundation of the uncompleted building?

Ans. Yes, sir.

Q. Do you know the dimensions of that foundation, Mr. Lemmon, or have you any data that would identify it? I would like to have the dimensions of that foundation given?

A. I haven't it here, but I can bring it after dinner.

Q. You have on here "Old Capitol Building." Do you refer to that building as the one in which the legislature held their sessions.

Ans. Yes, sir.

Q. Those grounds are fenced?

Ans. Yes, sir, partially.

Q. Where are the fences located?

Ans. On the south, east and west sides.

29 Mr. FALKNOR: We now offer this in evidence.

COURT: Let it go in for what it is worth.

(Same is received and marked in evidence.)

Q. I would like to have the dimensions of the foundation as to what part of the foundation is on the ten-acre tract. You have testified as to what portion is on this ten-acre tract? Can you testify now, Mr. Lemmon, approximately, what portion of this foundation is on the ten-acre tract?

A. Approximately one-sixth of the area of the foundation is on the two-acre tract.

Q. That would be, then, five-sixths on the ten-acre tract?

A. Yes, sir.

Q. You could not testify now, approximately, as to the size of this foundation?

A. I have my notes on that, and will bring them.

Mr. SAVAGE: We don't care how big it is.

Cross-examination.

By Mr. SAVAGE:

Q. What is the map that I now hand you?

A. That is a lithograph of the city of Olympia.

Q. It is a reliable map?

Mr. FALKNOR: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

COURT: I don't understand your offer.

Mr. SAVAGE: I asked if this map was a reliable map. I propose to locate on this map the tract in question?

COURT: What is the purpose of all this anyhow? What is the object of it? Is there any possible dispute as to where this foundation is?

Mr. SAVAGE: There is. The defendants allege that cer-
30 tain parts of that land are outside of the boundary, and are seeking to recover from us on that portion, and my purpose in offering this is to have this record complete, to show the location of these two buildings and to show how far they extend on the property.

COURT: Well, that is all in evidence. The Secretary of State testified that one building was about half or three-quarters of a mile distant from the other. That is already in the record as to the distance between these two capitol buildings, if that is what you want.

Mr. SAVAGE: Very well, then.

(Witness excused.)

(PHIL SKILLMAN, attorney, associated with plaintiff's counsel.)

Mr. SKILLMAN: I understand that testimony is being introduced on the part of the defendants, but Governor Mead is now here to testify, and we would like to call him at this time.

Mr. FALKNOR: There is no objection.

ALBERT E. MEAD, called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. SAVAGE:

Q. Your name is what?
Ans. Albert E. Mead.
Q. You are Governor of the State of Washington?
Ans. Yes, sir.
Q. And have been since last regular election?
A. Yes, sir; I have been in office since January.

Q. Will you state in what place in the city of Olympia
31 your office is being held at the present time? Describe it in a general way by streets.

A. Well, in the building formerly used as the Thurston County Court House. The Executive Offices are in the front part of the building, and the block is bounded, I think, by Washington Street on the West, Franklin Street on the East, Seventh Street on the South, and Sixth Street on the North.
Q. The building faces Sylvester Park?
Ans. Yes, sir.
Q. Your office has been in that building since you were inaugurated?
Ans. Yes, sir.
Q. How is it with regard to the other State offices and the legislative halls?
A. Well, the building contains the Halls of the House of Representatives and the Senate. The State Supreme Court Room is in the building, and also the offices of the Treasurer, Secretary of State, Land Commissioner, and Attorney General.
Q. They are all contained in this building?
Ans. Yes, sir.
Q. I will ask you if you know, generally, the situation of what is known as the "old capitol building" up on 13th Street?
A. Yes, sir, I know where it is.
Q. I will ask you if you know what State officers hold their offices in that place?
A. No, sir, they have not held their offices there since the 11th day of January this year.
Q. Who, if you know, representing the State, occupies that place?
A. I only know that the Secretary of State has charge of it, and has some tenants there.
Q. None of the officers of the State hold their offices there?
A. No, sir.

Q. I will ask you if you know Mr. James A. Haight,
32 formerly Assistant Attorney General?

Ans. Yes, sir.
Q. I will ask you whether or not you have in your office an opinion rendered by him, touching the title of the State with regard to the Old State Capitol Grounds?

A. We have an opinion by Mr. Haight, but I can't say that I have examined it very closely.

Q. Have you that opinion?

Ans. Yes, sir.

Q. Will you produce it?

Ans. (Witness does so.)

Q. That is the opinion rendered by Mr. Hait?

A. I understand that is the paper referred to in your subpœna. It is on file in the Capitol Building at the present location. I have not examined it, but I suppose it is the one you refer to.

Mr. SKILLMAN: We would like the same marked an identification.

(The same is marked as identification No. 4.

Mr. FALKNOR: It is understood at this time that this offered only at this time as an identification.

COURT: Do you expect to offer it in evidence?

Mr. SKILLMAN: It is simply offered as an identification at the present time.

Q. I will ask you where the last session of the legislature was held.

Ans. In the building that I have just described.

Q. Will you also explain where the next preceding session of the legislature was held?

Ans. I was not here at the time, but I understand it was held in the building known as "The Lobby," a building owned by Col. Heustis.

Q. That building is within a block of the present capitol?

A. Yes, sir.

33 Q. I will ask you whether or not there has been a question about the State accepting a deed to what is known as "The Sylvester Park?"

Mr. FALKNOR: That is objected to as being incompetent, irrelevant and immaterial.

COURT: It would seem so. I fail to see the relevancy of it.

Mr. SKILLMAN: If we do not connect it with material matters, it may go out. It joins the present capitol and there is some question as to the deed as to Sylvester Park, in regard to the title.

COURT: What has the proposition of the Sylvester Park to do with the alleged abandonment of the old capitol site? It seems to me that I can put some limit on the testimony here. The objection will be sustained as not being material.

(Exception taken.)

Q. I would ask you, Governor, whether or not the State exercises any control over what is known as "Sylvester Park" immediately in front of the capitol building?

A. Yes, sir; the Secretary of State has charge of the Sylvester Park, so far as improvements are concerned, and the keeping of it and the grounds.

Q. Is that where the statue of Governor Rogers is?
A. Yes, sir.
Q. Has there been some question as to the vacating of the street between Sylvester Park and the Capitol Building?
A. There has been some discussion as to that.
Q. And that question has not been entirely settled yet?
A. No, sir.
34 Q. So that, as a matter of fact, the State has charge of what is known as "Sylvester Park,"—it has control of it.
A. Yes, sir.
Q. And has absolute charge in that regard?
Ans. Yes, sir.

(Witness excused.)
COURT: You may continue upon the part of the defendant.

EDMUND RICE, called as a witness on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. FALKNOR:

Q. What is your name?
Ans. Edmund Rice.
Q. Mr. Rice, what position did you hold, if any, at the time the foundation was being constructed on the lands in controversy in this suit?
A. I was one of the Capitol Commission, and acted as Secretary of the Board.
Q. Are you familiar, or do you know what the cost of the present foundation is or was?
Ans. Yes, sir, approximately.
Q. What was the cost?

Mr. SKILLMAN: We object to that as being immaterial, whether it cost one thousand dollars or a million. The question is as to its present value.
(Objection overruled. Exception taken.)

Q. What was the cost?
Ans. The cost of the basement?
Q. Yes.
Ans. That is, including the clearing of the ground, preparatory to the erection of the basement, and the basement itself, it would be between sixty and sixty-five thousand dollars.
35 Mr. SKILLMAN: Let me make a suggestion. Was not there a contract made? If so, we would object to his answering then as to what was paid by the State.
COURT: The answer should relate to what was paid.
A. The State paid for the preparation of the ground something in the neighborhood of one thousand dollars, or about that. Then, the contract of Moffit Bros. for the foundation was forty-eight thousand and some odd dollars. That brought it up to something like forty-

nine thousand dollars. And then the architect's fee was paid, something in the neighborhood of thirty thousand dollars, and then the Commissioners per diem and the Secretary's expenses added to that.

Q. Making a total cost of about what?

A. Between sixty and sixty-five thousand dollars.

Cross-examination.

By Mr. SKILLMAN:

Q. You have lived in this city some time, have you not?

A. Fifteen years.

Q. And have dealt in real estate in this city?

Ans. Yes, sir.

Q. And you are familiar with the value of property here, are you not?

Ans. To some extent.

Q. And not only here but elsewhere?

Ans. Yes, sir.

Q. You are familiar with the lands up there near this property in controversy?

Ans. Yes, sir.

Q. Do you know the "Old Capitol" building there, the old wooden building?

Ans. Yes, sir.

Q. Do you know with regard to the basement that has been put up or constructed there by the State?

Ans. I do.

Q. Now, laying aside all value that might be placed upon it for capitol purposes, and assuming that you were the owner of that property, what would be the value, the reasonable value of
36 the improvement upon that? I mean, that basement as it exists right there at the present time for general business purposes?

Mr. FALKNOR: Objected to as not being proper cross-examination. The witness was not put on for that purpose.

COURT: I understood the witness was put on to show the value of the improvements on the property, and he may answer the question as to what would be the value to him,—what a fair market value would be.

A. For what purpose?

Q. Well, if you were buying or selling it for business purposes, or any such purposes?

A. You mean the improvements as they stand to-day?

Q. Yes, sir, other than capitol purposes, just simply that, knowing what you do about real estate values in this State.

COURT: For any purpose to which it could be put; the market value, considering all the uses to which it might be applied.

Mr. FALKNOR: You understand you are not precluded in your answer, considering the foundation in the light of any purpose for which it might be used.

A. Well, for some purposes,——

Mr. SKILLMAN: We dislike Counsel qualifying my question in that regard.

COURT: What is the fair market value of the improvements with reference to any and all uses to which they might be applied?

A. They are worth just as much as they cost for the purposes for which they were placed there.

37 Q. Suppose you were owning it at the present time, what would be its market value?

A. I am not qualified to say as to that, and I could not say.

Q. Would you say that foundation could be used for any purpose except for erecting a building?

A. I don't know.

Q. What would the land be reasonably worth if the foundation was not there?

Mr. FALKNOR: That is objected to as being immaterial.

COURT: It would seem so.

Mr. SKILLMAN: I will follow that with another question.

COURT: What difference would it make what the land is worth?

Mr. SKILLMAN: I am getting at what it would be worth as regards the land simply. I would then follow that and ask about the improvements already thereon.

COURT: You have just propounded that question.

Mr. SKILLMAN: But the witness could not state as to that.

COURT: The objection will be overruled as to that question.

Q. What did I understand your answer was to the last question? I propounded as to the value of the property?

A. The foundation is worth all it cost for the purpose for which it was erected originally, but for any other purposes I don't know what it would be worth.

Q. You could not state the value of it then at the present time?

Ans. No, I could not.

38 Q. You are a property owner in this city?

Ans. No, I don't own anything here.

(Witness excused.)

MILLARD LEMMON, recalled for examination on the part of the plaintiffs.

Cross-examination.

By Mr. SAVAGE:

Q. Did I understand you to say that you had run the lines as outlined on this map?

Ans. Do you mean by that the exterior of the two tracts of the Capitol grounds? If so, I did not entirely. I understood the purposes of the survey to be to locate the positions of the two buildings on the ground, the old building and the new foundation. I retraced the north boundary and located them with reference to that, using

the corners that had been previously located and established and accepted by the adjoining property owners as the boundary of the Capitol grounds.

Q. Is there any fence on the north boundary?

Ans. No, sir.

Q. Did you ever survey it entirely?

Ans. No, sir.

Redirect examination.

By Mr. FALKNOR:

Q. Did you make any measurements of the old capitol foundation?

Ans. Yes, sir.

Q. Will you indicate to the Court what those measurements are with reference to the foundation?

A. The extreme north and south dimension, not including the arch at the north side of the foundation, is 163 feet, and the extreme east and west dimension, 268 feet. The arch on the north side of the foundation approaches toward the north line of the two-acre tract within 28½ feet. That is the nearest point to the north
39 boundary.

Q. Do you know how high the foundation is from the ground to the top?

Ans. No, sir, I did not take that.

Q. Could you approximate it?

Ans. I should think it is about 16 feet.

Q. Are there any interior walls?

Ans. There are.

(Witness excused.)

WILLIAM OGLE, re-called for further direct examination on the part of the defendant, testified as follows:

Direct examination.

By Mr. FALKNOR:

Q. Mr. Ogle, you may state to the Court for what purposes the foundation on the land could be used?

A. Why, it could be used for the capitol building or any large state building to a certain extent. It might be in some ways a little expensive. It could be used for any state building.

Cross-examination.

By Mr. SKILLMAN:

Q. You have lived in this city, how long?

A. I have been here a little over 15 years.

Q. You are acquainted with the land and property in the vicinity of this city in a general way?

Ans. Well, somewhat.

Q. You are a carpenter and builder?
Ans. Yes, sir.
Q. You know where the business part of the city is?
Ans. Yes.
Q. And you know the business property in a general way?
A. I know as to its selling.
Q. And you know as to the residence property?
Ans. Yes, sir.

Q. I will ask you if this foundation is in the business part
40 of the city? Or, in the residence part of it?

A. Well, it is in what I suppose they call the residence part of it.

Q. About how far from the actual business part of the city? About how many blocks?

A. Well, it is between nine and ten blocks. It is at the end of 13th Street.

Q. Now, how far west of Main Street?

Ans. Two blocks, from Main Street to the edge of the Capitol Block.

Q. That is west of Main Street?

A. Yes, sir; it is on Water and Columbia Street-.

Q. Now, could that present foundation, considering its size, be used for a residence?

Ans. Oh, no.

Q. Would it be a good business proposition to use it for a business property?

A. Well, if they were to build a big fine hotel on it.

Q. But, not for a grocery store or a merchandise store or anything of that sort?

Ans. I don't think it would be a good place for a grocery store or a boarding house.

Q. Can you say as to the value of that property, the reasonable market value at the present time in a specific or a general way?

A. I could not. It would be owing entirely to what it would be used for.

Q. Well, for any reasonable purpose?

Ans. Well, the foundation itself is all right, if it could be used for any building. It is hard to place a value on that foundation.

Q. It would be hard to place any value on it now, on the foundation itself?

A. Yes, sir, the foundation, of course, is worth more than
41 it cost.

Q. What are the ten acres worth alone?

(Objected to as being immaterial. Objection sustained.)

(Witness excused.)

* * * * * * *

42–72 MILLARD LEMMON, recalled as a witness on the part of the defendant for further direct examination, testifies as follows:

Direct examination.

By MR. FALKNOR:

Q. Is the land described, or involved in this controversy, within the Donation Claim of Edmund Sylvester?
Ans. Yes, sir.

MR. SKILLMAN: There is no question about that.
(Witness excused.)

* * * * * * *

73 EDMUND RICE, recalled as a witness in rebuttal on the part of the State, testified as follows:

Direct examination.

By Mr. FALKNOR:

Q. Have you been engaged in the real estate business in Olympia?
Ans. Yes, sir.
Q. For how long?
Ans. For five or six years.
Q. Quite extensively?
Ans. To some extent.
Q. Are you familiar with values here?
Ans. Yes, sir.
Q. Are you familiar with the ten-acre tract in question in this suit?
Ans. Yes, sir.
Q. What would you deem the value of that land independent of the improvements?

MR. SAVAGE: Objected to as the witness has not testified that he knows, and further the Court has already ruled against evidence of that kind, and we ask that the same ruling be held on the part of the State.

COURT: The Statute of 1903 was not in the mind of the Court *what* I sustained that objection.

Q. What do you claim the land is worth?

MR. SAVAGE: Let the record show at this time that the
74 Plaintiff now offers to allow the defendant to take a decree fixing the title to this property in the defendant upon their paying to the plaintiffs the sum of $10,000.00.

MR. FALKNOR: Are you willing to stipulate that the value of this land, away from the improvements, is worth $10,000.00?

Q. Mr. Rice, what would be the value of this land independent of the improvements?

MR. SAVAGE: Objected to because it is incompetent. He has testified on yesterday that he did not know, and unless he can

show now that he has received some new light after what he had yesterday, he ought not to testify.

Witness: I don't think I was asked that question yesterday.

COURT: You may answer.

A. It is hard to say what it is worth. It is hard to say what it would sell for to-day. You might find a customer who would pay a good price for it, and you might not be able to sell it even for $10,000.00. But, I think it would sell for $1,000.00 an acre to-day.

Q. Inoependent of improvements?

Ans. Yes, sir.

Cross-examination.

By Mr. SAVAGE:

Q. Has it any added value because of the partial improvements? or that foundation?

Ans. I don't think so.

Q. In your estimate on the value of it, is that what you think it would bring at a cash sale?

A. I think there are people who would pay that for it.

75–80 Mr. FALKNOR:

Q. You don't mean to say that to the State that foundation would not be of any value?

Ans. No, I don't say that.

(Witness excused.)

* * * * * * *

81 Donation Certificate No. 72. Notification No. 44.

Whereas, in conformity with the provisions of the 7th Section of the Act of Congress, approved September 27th, 1850, entitled, "An Act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey, and to make donations of settlers of the Public Lands" and the amendments thereto, Edmund Sylvester of the county of Thurston, in the Territory of Washington, claiming a donation right, in virtue of the act aforesaid, to a certain tract of public lands, known and designated in the surveys and plats of the United States as Claim Number (47) forty seven, situated in sections No. (14) fourteen and (23) twenty three, in Township No. (18) Eighteen North of Range (2) Two West of the Willamette Meridian, containing 320 acres, having proven to the satisfaction of the Register and Receiver of Washington Territory, the fact that such settlement was commenced on the 1st day of February, 1850, more than four years prior to the date hereof, and having in pursuance of the requirements of the 7th section of the act aforesaid, established by two disinterested witnesses, the fact of continued residence and cultivation, required by the 4th section of the said act:

Now, therefore, be it known, that we, Wm. A. Strickler and S. Garfield, Register and Receiver of Public Land in said Territory, do hereby, and pursuant to the 7th section of the act aforesaid, certify

to the Commissioner of the General Land Office, the facts aforesaid, accompanied by the evidence thereof, in order that a patent may be issued to said claimant for the tract of land described, as required by the 7th section of the act aforesaid, Provided, the said Commissioner shall find no valid objection thereto.

Given under our hands at the Land Office in Olympia, for
82 the District of Washington Territory, the first day of July, 1858.

(Sd.) WM. A. STRICKLER, *Register.*
S. GARFIELD, *Receiver.*

83 STATE OF WASHINGTON,
County of Thurston, ss:

I, T. T. Langridge, County Auditor of Thurston County, State of Washington, do hereby certify that the foregoing is a true and correct copy of Donation Patent recorded in Vol. 3 of Deeds at page 141, as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand and official seal this 25th day of Nov., A. D. 1905.

[Seal Auditor of Thurston County, Washington.]

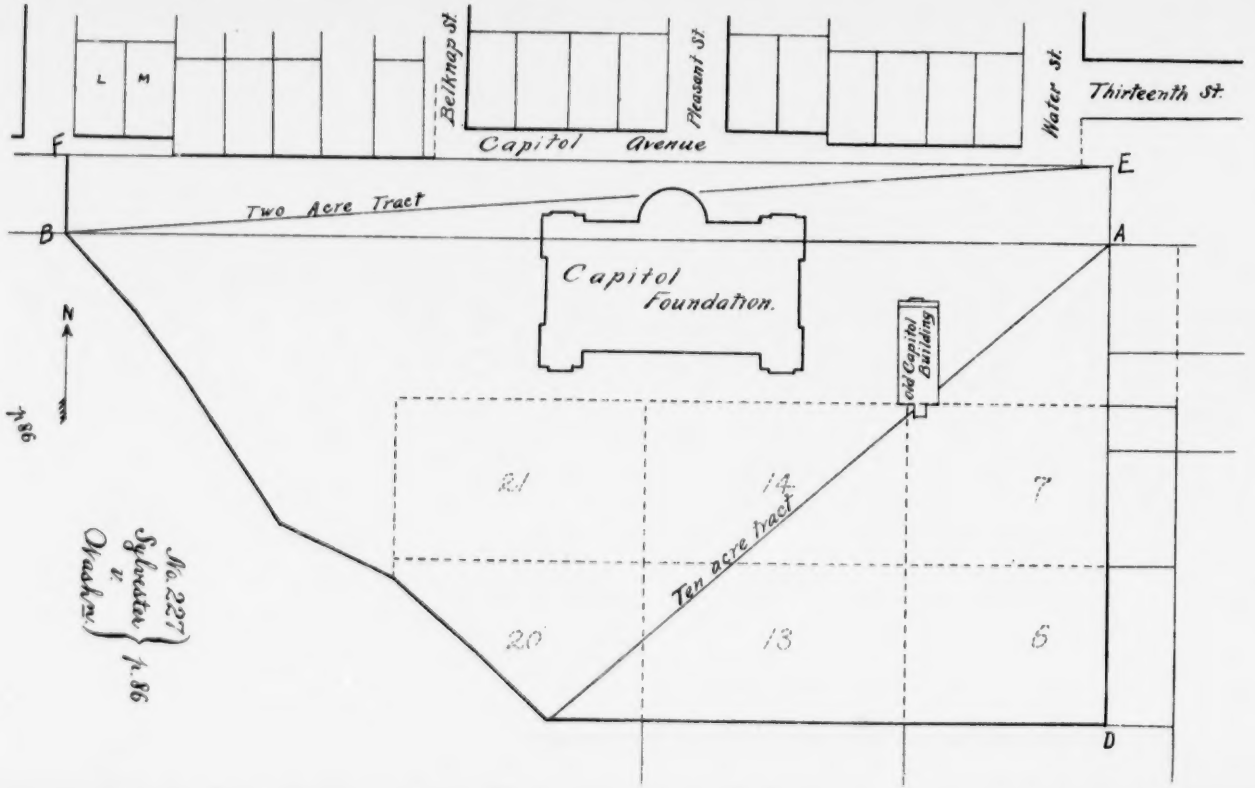
T. T. LANGRIDGE,
County Auditor,
By J. T. OTIS, *Deputy.*

[Endorsed:] # 84. 4 70¢. Don Cert. Exhibit 2. Filed in Superior Court Thurston Co., Wash, Nov. 28, 1905. B. T. Baker, Clerk.

84 A.

This Indenture, made and entered into this eighteenth day of January in the year of our Lord one thousand eight hundred and fifty five, between Edmund Sylvester and Clara E. his wife of the county of Thurston and Territory of Washington of the first part, and the Territory of Washington of the second part

Witnesseth, that for and in consideration of the sum of one dollar to them the said party of the first part in hand paid by the said party of the second part; the receipt whereof is hereby acknowledged, hath this day bargained and sold, and by these presents do grant, bargain, sell, convey, and confirm, unto the said party of the second part, all that certain lot, piece, or parcel of land, on the land claim of the said party of the first part, in the County of Thurston and Territory of Washington. In section Twenty three (23) township eighteen (18) north range two (2) west containing ten (10) acres and more particularly described as follows, commencing at a point south twenty four (24) deg. twenty three (23) min. W. nineteen (19) and ten (10) hundredth chains from the north west corner of Main and Union streets—thence south seven (7) chains and fifty (50) links, thence west eight (8) chains and fifty eight (58) links, thence north forty seven (47) deg. west one (1) chain and seventy three (73) links, thence north forty eight (48) deg. thirty (30)


L
M
Belknap St.
Pleasant St.
Water St.
Thirteenth St.
Capitol Avenue
F
E
B
A
D
Two Acre Tract
Capitol Foundation.
Old Capitol Building
N
21
14
7
20
13
6
Ten acre tract
No. 227
Sylvester
v.
Okashe.
1. 86
1. 86

min. west one (1) chain and sixty (60) links thence north sixty five (65) deg. west one (1) chain and ninety three (93) links, thence north thirty three (33) deg. thirty (30) min. west two (2) chains and eighty (80) links, thence north thirty eight (38) deg. west one (1) chain and seventeen (17) links, thence north forty five (45) deg. west one (1) chain and eighty seven (87) links, thence east sixteen (16) chains and four (4) links to place of beginning, To have and to hold the same, to the said party of the second part forever, free of any claim of the said party of the first — their heirs and assigns, or any or all persons claiming by, through, from, or under them or any of them.

In testimony whereof the said party of the first part hath hereunto set their hands and affixed their seals the day and year first written.

EDMUND SYLVESTER. [SEAL.]
CLARA E. SYLVESTER. [SEAL.]

Signed and delivered in presence of
Attest:
B. F. KENDALL,
ELWOOD EVANS.

TERRITORY OF WASHINGTON,
County of Thurston:

Personally appeared before me at the said Olympia on the twenty [fifth]* day of January year, 1855, the above named Edmund Sylvester who signed and sealed the foregoing instrument in writing and acknowledged the same to be his free act & deed and also on the same day and at the said place personally appeared before me the above named Clara E. Sylvester wife of the said Edmund Sylvester who signed and sealed the foregoing instrument in
85 writing and being examined by me separate and apart from her husband and had made known to her by me the contents of the above instrument in writing acknowledged the same to be her free act and deed for the purposes therein mentioned and that she executed the same voluntarily of her own free will and without fear or coercion from her husband.

Before me
[SEAL.]
B. F. KENDALL,
Notary Public.

[Endorsed:] Edmund Sylvester & wife To Deed Territory of Washington. Filed 3 o'clock April 26. Recorded April 26th 1858 in deed record book No. 3 of the records of Thurston County W. T. on page 34—William Wright County Recorder By A. J. Moses Deputy.

[Endorsed:] #3084. Def'ts Ex. A. Sylvester *et al. vs.* State of Wash. Filed in Superiá Court Thurston Co., Wash., Nov. 29th, 1905. B. T. Baker, Clerk.

(Here follows blue print of foundation marked p. 86.)

[* Word enclosed in brackets erased in copy.]

87 4–207 r.

B. M. F. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 13, 1905.

I hereby certify that the annexed copy of Donation Certificate No. 73 and Notification No. 44, located at Olympia, Washington, are true and literal exemplifications of the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

C. H. BURCH,
Recorder of the General Land Office.

88 Ex. S.

159,991.†

Donation Certificate, No. 73. Notification No. 44.

[SEAL.]

Whereas, In conformity with the provisions of the 7th Section, of the Act of Congress, approved September 27, 1850, entitled, "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey, and to make donations to settlers of the Public Lands," and the amendments thereto, Edmund Sylvester of the County of Thurston in the Territory of Washington, claiming a Donation Right, in virtue of the Act aforesaid, to a certain tract of Public Lands, known and designated in the Surveys and Plats of the United States, as Claim number (47) forty-seven, situated in section No. (14) fourteen and twenty-three (23) in Township No. (18) eighteen north of Range (2) two west of the Willamette meridian containing three hundred and twelve acres, having proven to the satisfaction of the Register and Receiver of Washington Territory, the fact that such settlement was commenced on the 1st day of February 1850 more than four years prior to the date hereof; and having in pursuance of the requirements of the 7th Section of the act aforesaid, established by two disinterested witnesses, the fact of continued residence and cultivation, required by the 4th section of the said act: Now therefore, be it known, That we, Wm. A. Strickler and S. Garfielde, Register and Receiver of Public Land in said Territory, do hereby, and pursuant to the 7th section of the act aforesaid, certify to the Commissioner of the General Land Office, the facts aforesaid, accompanied by the evidence thereof, in order that a patent may be issued to said claimant for the tract of
89 land described, as required by the 7th section of the act aforesaid: Provided, The said Commissioner shall find no valid objection thereto.

[† In pencil in copy.]

Given under our hands, at the Land Office in Olympia, for the District of Washington Territory, this first day of July 1858.

[SEAL.] WM. A. STRICKLER, *Register.*
S. GARFIELDE, *Receiver.*

90 SECRETARY'S OFFICE,
OLYMPIA, WASHINGTON TERRITORY.

I, Charles H. Mason, Secretary of the Territory of Washington do hereby certify that before, and on the 24th day of March Anno Domini, 1854, Jatham W. Goodell, whose official signature and seal are attached to the foregoing affidavits, was a legally commissioned and qualified Notary Public in and for the County of Thurston and Territory aforesaid, duly authorized by law to administer oaths therein, this his signature and seal as filed in this office, lead to the belief that said acts are duly performed in virtue of his office as aforesaid, and that full faith and credit may be given to his official attestations.

In testimony whereof I have hereunto affixed my hand and the seal of the said Territory of Washington at Olympia the first day of October A. D. 1858.

[L. S.] C. H. MASON,
Sec., Wash. Ter.

91 No. 44.

No. 44.

Notification to Surveyor General of Oregon on the Settlement of Public Land in Township 18 *N., R.* 2. *W.*

Pursuant to the Act of Congress, approved on the 27th day of September, 1850, entitled, "An Act to create the office of Surveyor-General of the Public Lands in Oregon, and to provide for the survey and make Donations to Settlers of the Public Lands"—

I, Edmund Sylvester of Thurston Co. in the Territory of Washington (formerly Oregon) hereby give notice of my claim to Donation of 320 acres of land, known and designated in the Surveys and Plats of the United States as a part of Secs. 14, 22 & 23, in T. 18 N. R. 2 W. bounded and particularly described as follows beginning at a stake marked "B" being the N. E. corner of said claim which bears

S. 21° E. 9.75 ch.
South 13.56 " (S. 42.39 chs. W. 8.80 chs.)
S. 17° W. 10.20 "

S. 43° W. 13.65 " from the meander post on the east side of Budd's Inlet at the intersection of the section line between secs. 11 & 14, T. 18 N. R. 2 W. with said Inlet, running thence along the meanders of Budds Inlet as established by the U. S. Surveys

N. 46° W. 25.18 chas.
S. 42°¾ W. 20.00 chs.
S. 3° E. 40.35 " to the meander post

between secs. 14 & 23 thence S. 3° E. 3.15 chas.
" S. 65° 15′ W. 21.10 "
" S. 8° 15′ E. 4.57 "
" S. 19° E. 11.53 "
" S. 4° 11′ E. 6.30 "
" S. 25° 45′ E. 5.13 " to the S. W.
" S. 5° 30′ E. 4.75 "
corner of said claim " East 41.00 " to the S. E. corner of said claim which is due south from the stake marked "B" at the N. E. corner of said claim thence north 80.50 chas. to the place of beginning containing 320 acres, and including within the above boundaries the town of Olympia.

EDMUND SYLVESTER.

Oregon City 13 February 1854.

K. M. S. Notification on Unsurveyed land No. "454."

92 No. 44.

Edmund Sylvester of Thurston County, in the Territory of Washington being first duly sworn, says that he is a white settler on public lands in Washington Territory, formerly Oregon Territory, that he arrived in said Territory on the 10 day of September 1843, that he was a resident thereof between the 27th day of September, and the 1st day of December, 1850, and above the age of 18 years, on the 1st day of December, 1850, and that he is a native born citizen of the United States, and that he was born in Hancock Co. Maine in the year 1821 that he has personally resided upon and cultivated that part of the public lands in Oregon now Washington Territory particularly described in notification hereunto annexed, continuously, from the 1st day of January 1850 to the 13th day of February 1854. And he further says that he is not a married man.

EDMUND SYLVESTER.

Subscribed and sworn to before me in Oregon City this 13′ day of February 1854.

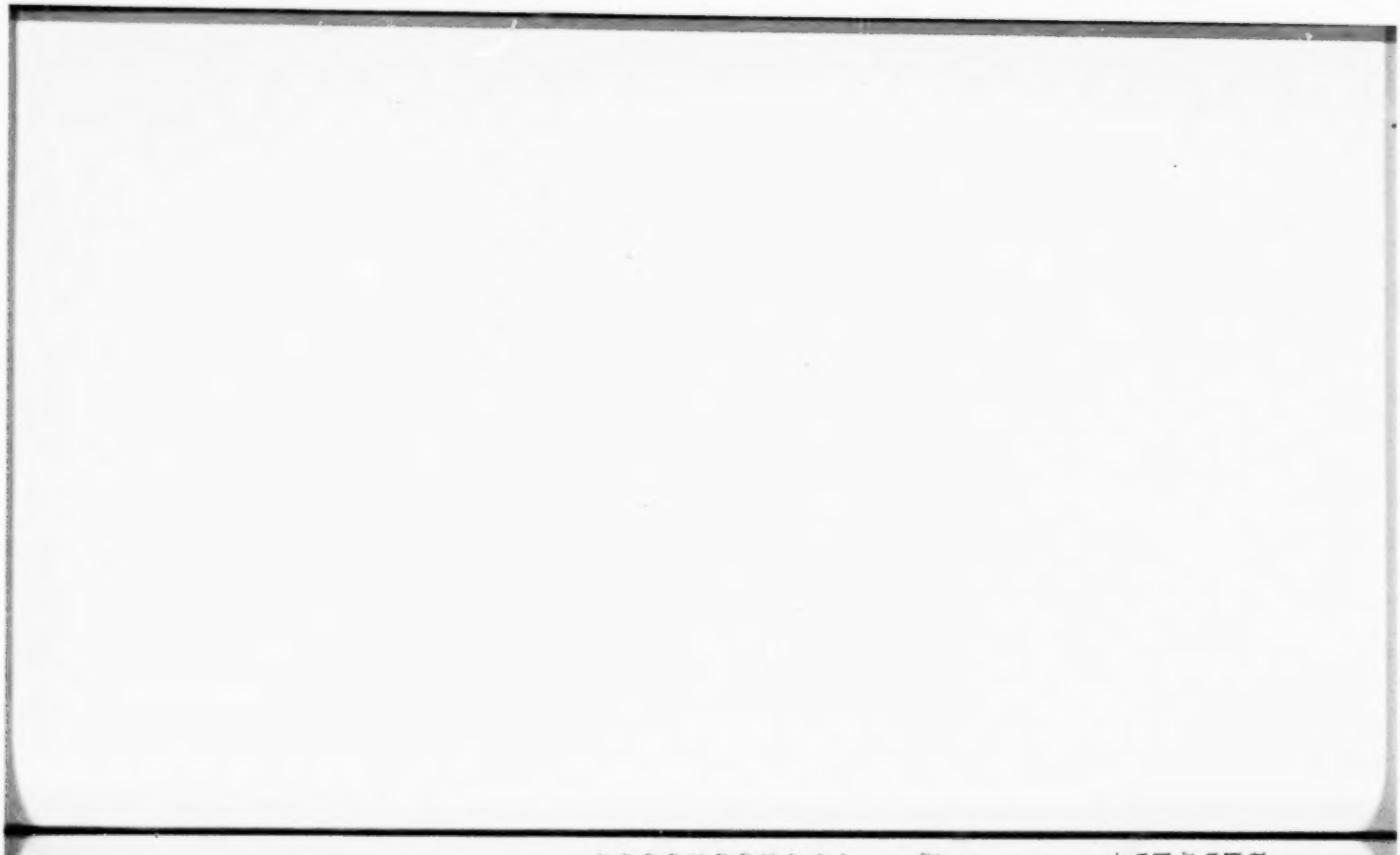
C. K. GARDNER,
Surv. Gen. of Oregon.

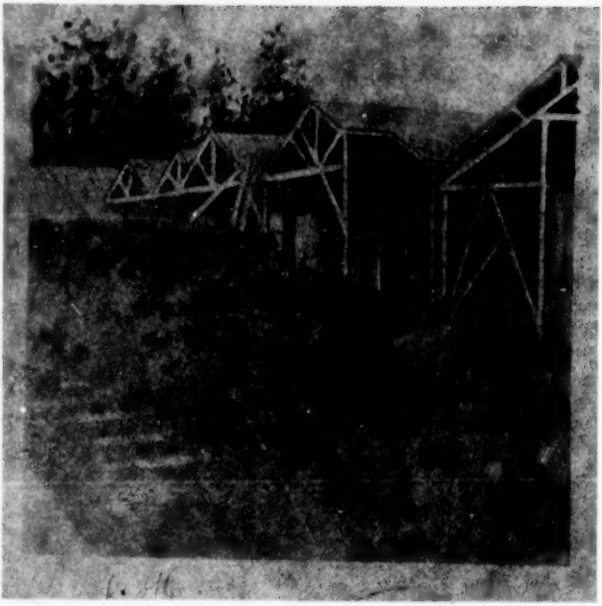
K. M. S.

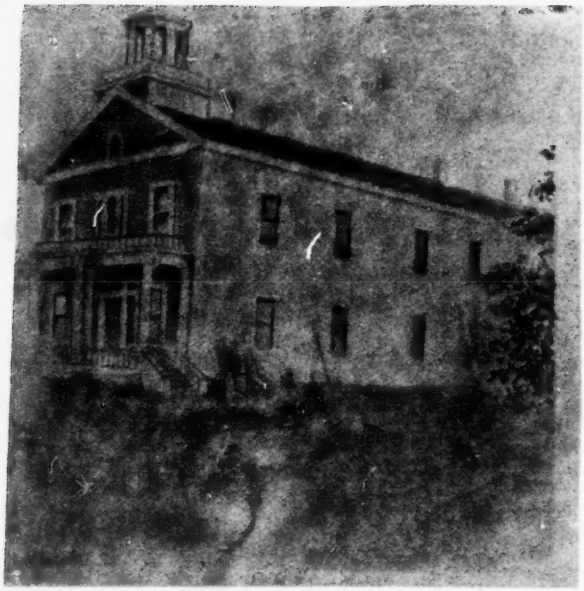
93 No. 44.

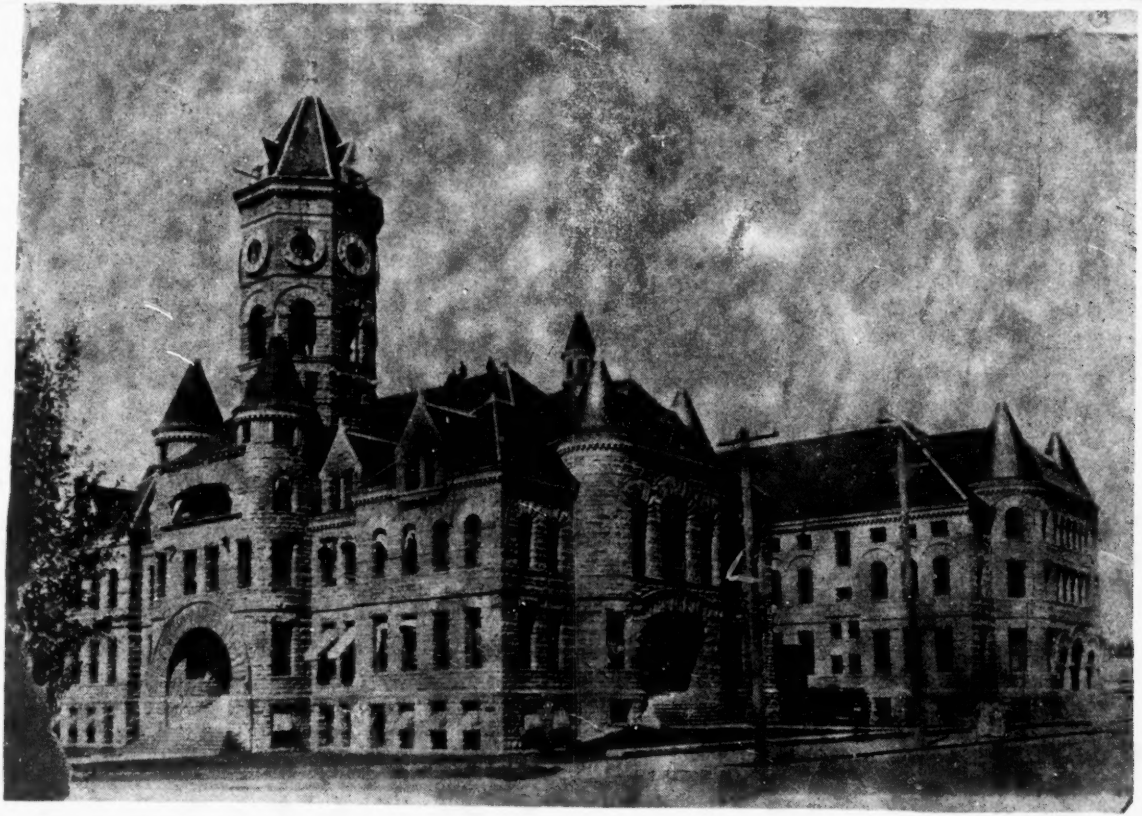
John M. Swan of Thurston County in the Territory of Washington, being first duly sworn, says that he is in no way interested in the tract of land claimed as a donation by Edmund Sylvester and particularly described in the annexed notification to the Surveyor General of Oregon: No. 44 that he is personally acquainted with said Edmund Sylvester and knows that he has personally resided upon and cultivated said tract of land continuously from the 1st day of February 1850 to the 25th day of March 1854.

JOHN M. SWAN.









Subscribed and sworn to before me, this 25th day of March 1854 in Olympia.

Witness my hand and official seal.

J. W. GOODELL,
Notary Public.

[SEAL.]

No. —.

George Blanchet of Thurston County in the Territory of Washington, being first duly sworn says that he is in no way interested in the tract of land claimed as a donation right by Edmund Sylvester and particularly described in the annexed notification to the Surveyor General of Oregon; No. 44 that he is personally acquainted with said Edmund Sylvester and knows that he has personally resided upon and cultivated said tract of land continuously from the 1st day of February 1850 to the 25th day of March 1854.

G. BLANCHET.

Subscribed and sworn to before me, this 25th day of March 1854 in Olympia.

Witness my hand and official seal.

J. W. GOODELL,
Notary Public.

[SEAL.]

94 [Endorsed:] Olympia Donation Certf. 73. Edmund Sylvester. Pat. May 3, 1860. Rec. Vol. 1, page 461. Pat. Tran'd to Register at Olympia May 18 1860. Interferes with Olympia Townsite. See plat E. 86,699 Vol. 2 N. & W. 244.

95–103 (Here follow photographs marked pp. 96, 97, 98 & 99.)

[Endorsed:] Filed in Superior Court Thurston Co., Was-., Nov. 28, 1905. B. T. Baker, Clerk.

104 *Township 18 N., R. 2 West, W. M., Washington.*

Transcript of the field notes of the survey of the Donation Land Claim of 320 acres, confirmed to Edmund Sylvester; claim No. 47, Notification No. 44, in Sections 14 and 23, in Township No. 18 North of the line of Range No. 2 West of the Will. Mer., in the State of Washington.

"Begin at the cor. of frac. Secs. 14 and 23, and run thence with the meanders on the East side of Budd's Inlet, as follows:

In Sec. 14.

Courses.	Distance.	
N. 3°	W. 40.15	chs.
N. 42½°	E. 20.00	"
S. 46°	E. 25.18	" To post in the mud; and from which corner I run

South,—Va. 21° 00′ E.

17.00 Leave mud flat and enter timber.
37.00 To the line bet. Secs. 14 and 23, and set a post 3.60 chs. East of the ¼ Sec. cor.; and from which post
A cedar, 20 ins. in dia., brs. N. 36° W., 140 lks. dist.
A cedar, 22 " " " " S. 53° E., 23 " "
78.31 Set a post; and from which post
A maple, 18 ins. in dia., brs. N. 27° W., 27 lks. dist.
A fir, 39 " " " " S. 56° E., 18 " "
From which cor. I run

West,—Va. 21° 00′ E.

20.50 To the road to Olympia, brs. N. and S.
31.00 To bluff, brs. N. W. and S. E.
39.00 To the foot of the same, and with the same bearing.
41.00 Set a post, in a mound, on the meander line; and from w'h post
An alder, 4 ins. in dia., brs. S. 60° E., 134 lks. dist.
An alder, 5 " " " " N. 50° E., 115 " "
Thence with the meanders, as follows:

In Sec. 23.

N. 5½°	W.	3.00	chs.
N. 25¾°	W.	5.13	"
N. 4½°	W.	6.30	"
N. 19°	W.	11.53	"
N. 8¼°	W.	4.57	"
N. 65¼°	E.	21.10	"
N. 3°	W.	3.30	" To post, and place of beginning.

The land on this claim is good, 2d rate soil with timber of fir, cedar, maple, hemlock, alder, and spruce, with und'g'th of salal, hemlock, vine maple, and briers.

"Surveyed April 22d, 1857."

"THOMAS F. BERRY,"
"Dep. Surveyor."

105 Office of U. S. Surveyor General, State of Washington.

OLYMPIA, *November* 25, 1905.

I, E. P. Kingsbury, U. S. Surveyor General for the State of Washington, do hereby certify that the annexed transcript of field notes of survey of the Donation Land Claim of Edmund Sylvester, in Sections 14 and 23, Tp. 18 N., R. 2 W., W. M., Washington, is a true and literal exemplification from the official field notes of said survey on file in this office.

E. P. KINGSBURY,
U. S. Surveyor General, Washington.

[Endorsed:] Surv. General, W'n. #3084. Survey. Pl'f's Ex. 8. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

106 This Indenture made and entered into this eighteenth day of January, in the year of our Lord one thousand eight hundred and fifty five, between Edmund Sylvester and Clara E. his wife, of the County of Thurston and Territory of Washington, of the first part, and the Territory of Washington, of the second part,

Witnesseth, that for and in consideration of the sum of One dollar to them the said party of the first part in hand paid by the said party of the second part: the receipt whereof is hereby acknowledged, hath this day bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, all that certain lot, piece or parcel of land, on the land claim of the said party of the first part, in the County of Thurston and Territory of Washington, in Section twenty three (23) Township eighteen (18), North Range two (2) west, containing ten (10) acres and more particularly described as follows—Commencing at a point South twenty-four (24) deg. twenty three (23) min. W. Nineteen (19) and ten (10) hundredths chains from the north west corner of Main and Union streets—thence South seven (7) chains and fifty (50) links—thence west eight (8) chains and fifty eight (58) links—thence north forty-seven (47) deg. west, one (1) chain and seventy-three (73) links—thence North forty eight (40) deg. thirty (30) min. west one (1) chain and sixty (60) links—thence north sixty-five (65) deg. west one (1) chain and ninety-three links, thence North thirty-three deg. (33) thirty (30) min. west two (2) chains and eighty (80) links—thence North thirty-eight (38) deg. west one (1) chain and seventeen (17) links, thence north forty five (45) deg. west one (1) chain and eighty-seven (87) links, thence east sixteen (16) chains and four (4) links to place of beginning.

107 To have and to hold the same, to the said party of the second part forever, free of any claim of the said party of the first [part,]* their heirs and assigns, or any or all persons claiming by, through, from, or under them or any of them.

[*Word enclosed in brackets erased in copy.]

In testimony whereof the said party of the first part hath hereunto set their hands and affixed their seals the day and year first above written.

(Signed) EDMUND SYLVESTER. [SEAL.]
CLARA E. SYLVESTER. [SEAL.]

Signed and delivered in presence of
Attest:
B. F. KENDALL.
ELWOOD EVANS.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Personally appeared before me at the said Olympia on the twenty [fifth]* day of January, year 1855, the above named Edmund Sylvester who signed and sealed the foregoing instruments in writing, and acknowledged the same to be his free act and deed, and also on the same day and at the same place personally appeared before me the above named Clara E. Sylvester, wife of the said Edmund Sylvester, who signed and sealed the foregoing instrument in writing, and being examined by me separate and apart from her husband and had made known to her by me the contents of the above instrument in writing acknowledged the same to be her free act and deed for the purposes therein mentioned, and that she executed the same voluntarily of her own free will and without fear or coercion from her husband.

Before me

B. F. KENDALL, [SEAL.]
Notary Public.

Recorded here April 26th, 1858.
WILLIAM WRIGHT, *Co. Rec.*,
By A. I. MOSES, *Deputy.*

108 STATE OF WASHINGTON,
County of Thurston, ss:

I, T. T. Langridge, County Auditor of Thurston County, State of Washington, do hereby certify that the foregoing is a true and correct copy of deed, from Edmund and Clara E. Sylvester, to Washington Territory, as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand and official seal this 8th day of March A. D. 1905.

[Seal Auditor of Thurston County, Washington.]

T. T. LANGRIDGE,
County Auditor,
By J. T. OTIS, *Deputy.*

[Endorsed:] #3084. Recorded in Volume 3 Deed Records at page 34. Exhibit 9. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

[*Word enclosed in brackets erased in copy.]

109 U. S. LAND OFFICE, OLYMPIA, WASH., *Nov.* 27, 1905.

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the tract book of my office shows that Edmund Sylvester made final proof on his donation claim, Donation Certificate No. 73, Notification No. 44, on July 1, 1858.

FRED W. STOCKING, *Register.*

[Endorsed:] Pl'ff's Ex. 9.

110 U. S. LAND OFFICE, OLYMPIA, WASH., *Nov.* 27, 1905.

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the records of my office do not show the date of the filing of a notification by Edmund Sylvester.

FRED W. STOCKING,
Register U. S. Land Office, at Olympia.

[Endorsed:] Register, Olympia. #3084. Pl'ff's Ex. 10. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

111 Office of United States Surveyor General for the State of Oregon.

PORTLAND, OREGON, *November* 3, 1905.

I hereby certify that I have made careful search of the records of this office, and that I find no record of any notification, given by Edmund Sylvester, of his intention to make final proof on his donation claim situated in Sections 14 and 23, Township 18 North, Range 2 West, W. M.

JNO. D. DALY,
Surveyor General.

112 [Endorsed:] Pl'ff's Ex. 11. #3084. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

113 UNITED STATES LAND OFFICE,
PORTLAND, OREGON, *November* 23, 1905.

We hereby certify that we have examined the records of this office, and there is nothing therein to indicate that any notice or notification of any kind or character was ever filed in this office concerning the donation claim of Edmund Sylvester, located in Sections 14 and 23, Township 18 North, Range 2 West, W. M. There is nothing in this office to indicate that said Edmund Sylvester ever settled upon, resided upon, claimed or offered or made final proof under the Donation Act to the aforesaid land, or any other land whatsoever.

In witness whereof, we have hereby set our hands this 23 day of November A. D. 1905, at Portland, Oregon.

ALGERNON S. DRESSER, *Register.*
GEO. W. BILEU, *Receiver.*

114 [Endorsed:] Pltf's Ex. 12. #3084. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk. Land off. cls.

115 UNITED STATES LAND OFFICE,
PORTLAND, OREGON, *November* 3, 1905.

We hereby certify that we have made careful search of the records of this office and are unable to find any record of notification, given by Edmund Sylvester, of his intention to make final proof on his donation claim located in Sections 14 and 23, Township 18 North, Range 2 West, W. M.

ALGERNON S. DRESSER, *Register.*
GEO. W. BILEU, *Receiver.*

116 [Endorsed:] P'f. Exhibit No. 13. #3084. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

117 Copy.

OLYMPIA, WASHINGTON, *March* 18, 1893.

Hon. John H. McGraw, Governor.

DEAR SIR: Regarding the title to the present Capitol ground of the state of Washington, proposed as the site for the Capitol to be erected pursuant to House Bill No. 292, I beg leave to report the following:

1. The state, formerly Territory, of Washington received its title to ten acres of the proposed site from Edmund Sylvester of Olympia, by a bargain and sale deed dated January 18, 1855, and recorded April 26, 1858. The then Territory of Washington entered into possession of the tract, and in 1856 the Legislative Assembly building was erected. From that time to the present the possession of the Territory, now State, has been continuous.

2. At the time of his conveyance to the Territory the grantor Sylvester was in possession of the premises as a settler under the Donation Act, but had not yet applied for or received his patent, which was not issued until May 3, 1860.

3. Three years prior to his conveyance to the Territory, May 11, 1852, he had given a quit-claim deed to one Quincy A. Brooks, of an eighty acre tract that included the present capitol site. This deed contained a covenant to convey by a warranty deed, within twenty days after the said Sylvester should receive patent from the United States. Brooks executed a similar deed to one Luman H. Calkins, for a thirty acre tract embracing the present capitol site, and Calkins quitclaimed the present capitol site to the Territory,

January 16, 1855, about the time Sylvester gave his deed to the Territory. Within a few days prior, however, to executing his deed to the Territory, Calkins had conveyed five one-acre tracts lying partly or wholly within the capitol grounds. Some of these grantees have quitclaimed to the Territory; others have strengthened their title by warranty deeds from Sylvester before he received his patent, or by quitclaims since.

4. The fact that the possession of the state has been open, notorious, continuous, unquestioned, with claim of right under color of title and with universal acquiescence of the public and all parties interested, does not do away with the necessity of investigating the validity of these various conveyances and determining where they place the title.

5. Adverse possession, where it is established, gives the citizen perfect title. It can, however, according to eminent authority, give no title to a sovereign who does not permit himself to be sued. The Statute of Limitations does not begin to run until an action can be brought. The Commonwealth of Washington, whether as Territory or as state, has never suffered itself to be made a party generally to actions, or specially, so that claimants to this tract could have brought the state into court. These parties, therefore, have been under a continuous disability, and as to them the Statute of Limitations has not begun to run.

6. This exemption of the state from suit, though depriving it of the advantage of gaining title by adverse possession, practically gives it no protection from attack if its original title is vulnerable. Though the state cannot be sued, its agents and servants can be,
and as the state can hold possession of real estate as well as
118 do all other things only through its agents and servants, it is
subject to dispossession by the eviction of its officers and agents at all times unless its title is without a blemish.

7. The long continued possession of the state and its devotion of this tract to capitol purposes may fairly be deemed to establish a dedication by all interested parties of the land to that purpose. Although at common law dedications for highway purposes alone were recognized, in the United States the doctrine has received a wider application, and dedications may be for squares, parks and public buildings, as well as for highways. Inasmuch as in this case the dedication would be implied, and the law is not well defined as to what period of time and what character and extent of use will establish a dedication by implication for a particular purpose, it will not do for the state to rely on such a dedication to reinforce a title otherwise weak.

8. Edmund Sylvester began his settlement February 1, 1850. The original Donation Act of September 27, 1850, forbad contracts for sale before patent, declaring such contracts void. An amendment approved July 17, 1854, repealed this provision with a proviso that sales before four years of residence should be void. The deed from Sylvester to Brooks was therefore void.

9. The certificate of the Register and Receiver of the U. S. Land Office at Olympia, dated July 1, 1858, shows that Sylvester con-

tinuously resided upon and cultivated the tract in question for the period of four years required by law, and that his settlement began February 1, 1850. This finding as to Sylvester and all claiming under him is conclusive. The prohibition of sales contained in the original Donation Act and in the amendment of July 17, 1854, applied to those conveyances or contracts of Edmund Sylvester that were made before July 17, 1854, since he had resided four years on the land before February 1, 1854.

10. The Supreme Court of the United States has repeatedly sustained sales before patent of settlers in Washington and Oregon, not expressly prohibited by the Donation Act and the acts amendatory thereof. That high authority has even held that the repealing act of 1854 was equivalent to an authority to sell. The deed, therefore, from Edmund Sylvester and his wife to the Territory was a valid conveyance, and the antecedent transfer of the same grantor being void, his title was transferred to and became vested in the Territory.

11. Inasmuch as this conveyance to the Territory was a bargain and sale deed without warranty, the legal title that vested in Edmund Sylvester by the patent from the United States did not inure to the Territory. Unless, therefore, the patent is deemed to relate back to a time anterior to the conveyance to the Territory, or it is held that the legal title vested in Sylvester before he deeded to the Territory, the Territory took and the State now holds only the equitable title to the property.

12. The operative words of the Donation Act are, "There is hereby granted." These words import a present grant and are as effectual as a patent to pass title as soon as there is a qualified grantee. It has been argued that upon compliance with the statutory requirements as to settlement, residence and cultivation, the settler becomes a qualified grantee, the words of the statute at once become operative and the title passes. This construction of the statute has received the approval of the Supreme Court of Oregon and the Supreme Court of the Territory of Washington. The Supreme Court of this state has within a few months cogently sustained this interpretation. The Supreme Court of the United States, in deciding another question arising under this act, has, in the course of its argument, used this same line of reasoning. It might
119 seem, therefore, that when the question comes fairly before the Supreme Court of the United States for adjudication, that tribunal will hold that the title vests by the operation of the act when the four years of continuous cultivation and residence are completed.

13. An amendatory act of February 14, 1853, however, required all settlers to file notifications of their respective claims with the Surveyor General, before December 1, 1853. The object of this requirement was evidently to enable the land officers of the United States to ascertain promptly what claims would be made under the Donation Act, to the end that fraud might be detected, conflicts prevented or adjusted, and the land to be granted aggregated from the public land.

14. Certainty as to the land conveyed being essential to a deed and important in the case of all grants, the requirement of notification would seem to be a pre-requisite to the vesting of the title. The Supreme Court of the United States, in a recent decision, inclines to this view. I have been unable to learn when Edmund Sylvester filed his notification with the Surveyor General. The records of the Olympia and Seattle land offices are silent. Of course the presumption, from the general recitals of the patent, is that the notification cannot be ascertained. If the notification was filed in time Edmund Sylvester had the legal title at the time he and his wife conveyed to the Territory. Otherwise, he had only the equitable title.

15. A patent under the Donation Act relates back to the time the patentee is entitled to it,—that is, to the time when he proves up and receives his certificate. Sylvester received his certificate July 1, 1858, three years after his deed to the Territory; therefore, his legal title under the patent did not pass by relation to the Territory.

16. The constitution transferred all the title of the Territory to the state.

17. Assuming that the title of the state is an equitable one, the holders of the legal estate are simply trustees from whom the State is entitled to conveyances. The legal title to most of this tract is in the legal representatives of Edmund Sylvester. All other holders of title have purchased since the Territory took possession and built the so-called Capitol. These, therefore, have had full notice of the rights and title of the Territory, and hold their bare legal title simply as trustees for the state.

18. A two-acre tract adjoins the original ten-acre tract on the north. This was conveyed to the Territory by Edmund Sylvester and his wife by warranty deed dated April 23, 1858. The legal title to this tract under the warranty inured to the Territory as soon as Sylvester received the legal title, and that title has passed to the state.

19. I am of the opinion that the state has an indefeasible legal title to the two-acre tract last mentioned, and an indefeasible legal or equitable title to the ten-acre tract; that if the title of the state is equitable, there is nothing but the bare legal title without beneficial interest outstanding; the possession of the state and its officers cannot be interfered with; the state is entitled to deeds from the holders of the legal title without further expense than the cost of the conveyances, and on refusal of such holders to execute the same they can be compelled to execute them or their titles may be appropriated under condemnation proceedings with no more than a nominal award.

20. I have prepared the requisite deeds to invest the state beyond all question with the full legal title, and I am informed that their execution is being secured and that they will be at an early date delivered to the state.

Very respectfully,

JAMES A. HAIGHT,
Assistant Attorney General.

[Endorsed:] Haight # 3084 Pl'ff's Ex. 14 Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, clerk.

120 This indenture, made on this the 4th day of October, nineteen hundred and one, at the city of Olympia, Thurston County, State of Washington, by and between the said city of Olympia, a municipal corporation, of the third class, duly incorporated under and by virtue of the laws of the said state of Washington, party of the first part, and the State of Washington, party of the second part, Witnesseth:

That, whereas, on the 16th day of September, 1901, the City Council of the City of Olympia passed Ordinance No. 725, entitled, "An ordinance providing for the granting of Sylvester Park to the State of Washington for use as part of Capitol grounds, stating conditions and limitations," which said ordinance is on file and of record in the office of the City Clerk of said city of Olympia, and

Whereas, by the terms of said ordinances herein referred to and made a part hereof the Mayor and the Clerk of the city of Olympia are empowered and directed to execute a deed of conveyance of said Sylvester Park:

Now therefore, for and in consideration of the sum of one ($1.00) dollar, the receipt of which is herein acknowledged to have been paid unto the said party of the first part, and the further consideration of the public benefits to accrue to the said city of Olympia and its inhabitants, the city of Olympia, party of the first part, hereby sells, grants and conveys unto the State of Washington, the said party of the second part, all of its right, title and interest in and to block numbered sixteen (16) of Sylvester's Plat of the City of Olympia, now owned by said City of Olympia and in use as
121 a public park, subject to the following conditions, to-wit:

In case the said State of Washington should at any time in the future cease to use and hold said block numbered 16 and the block numbered 26 of said Sylvester Plat of the city of Olympia, or either of them for State Capitol purposes, in accordance with the true intent and spirit of said ordinance No. 725, and of this instrument, then and in that event all right, title and interest of the State of Washington in and to said Block 16 shall revert to the city of Olympia for public use and benefit.

In witness whereof, we, the undersigned, the Mayor and the City Clerk respectively, have hereunto set our hands and seals on this the 4th day of October, A. D. 1901.

[Seal of City of Olympia, Washington.]

C. S. REINHART, *Mayor.*
D. K. PROUD, *City Clerk.*

Witnesses:

HELEN WILDER.
M. G. ROYAL.

STATE OF WASHINGTON,
County of Thurston, ss:

This certifies that on this the fourth day of October, A. D. 1901, before me, a Notary Public in and for Thurston County, State of Washington, personally appeared the within named C. S. Reinhart, Mayor of the City of Olympia, Thurston County, Washington, and D. K. Proud, City Clerk of Olympia, whose names are subscribed to the foregoing instrument as parties thereto for and on behalf of said city of Olympia, and that they are personally known to me to be the persons described in and who signed the foregoing instrument, and that they signed the said instrument and ac-
122 knowledged the same to be their free act and deed for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal of M. G. Royal.]

M. G. ROYAL,
Notary Public in and for the State of Washington, Residing at Olympia, Washington.

Com. expires July 19, 1903.

No. 21517. Filed by D. B. Garrison Oct. 18, 1901, at 10.42 o'clock A. M.

A. L. CALLOW, *Auditor.*
By J. T. OTIS, *Deputy.*

123 STATE OF WASHINGTON,
County of Thurston, ss.

I, T. T. Langridge, County Auditor of Thurston County, State of Washington, do hereby certify that the foregoing is a true and correct copy of Deed # 21517, City of Olympia to State of Wash. as the same appears of record in my office in Vol. 47 of deeds at page 473.

In witness whereof, I have hereunto set my hand and official seal this 25th day of Nov. A. D. 1905.

[Seal of the Auditor of Thurston County, Washington.]

T. T. LANGRIDGE,
County Auditor,
By J. T. OTIS, *Deputy.*

123½ [Endorsed:] Sylvester Park. 7/85¢. # 3084. Pl'ff's Exhibit 15. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

124 In the Superior Court of the State of Washington for Thurston County.

No. —.

CLARA E. SYLVESTER ET AL., Plaintiffs,
v.
STATE OF WASHINGTON, Defendant, Substituted as Defendant for A. B. ALLISON and —— ALLISON, His Wife.

Notice.

To the State of Washington, and to John D. Atkinson, Attorney General of said State; A. J. Falknor, Robert F. Booth, its attorneys of record:

You are hereby notified that the plaintiffs in the above entitled action will take the deposition of Mrs. Clara E. Sylvester, at No. 1711 East Harrison Street, Seattle, King County, State of Washington, on Saturday, November 25th, 1905, at the hour of 10 o'clock A. M. of said day. Said deposition will be used and read in evidence on behalf of the plaintiffs herein on the trial of the above entitled action, in the above entitled cause.

GEO. M. SAVAGE,
MAY SYLVESTER,
Attorneys for Plaintiffs, Seattle.

In the Superior Court of the State of Washington for Thurston County.

#3084.

CLARA E. SYLVESTER ET AL., Pl'ffs,
vs.
STATE OF WASHINGTON, Def't, Substituted as Defendant for A. B. ALLISON, &c.

Deposition of Mrs. Clara E. Sylvester, a witness in behalf of the Plaintiffs, taken before Willard L. Read, Notary Public in and for the State of Washington, residing at Seattle, on the 24th day day of November, 1905.

TO THE CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY, *Olympia, Washington.*

Filed in Superior Court, Thurston Co., Wash., Nov. 25, 1905.

B. T. BAKER, *Clerk.*

125 STATE OF WASHINGTON,
County of King, ss:

Q. 1. Are you one of the plaintiffs in the suit of Clara E. Sylvester and May Sylvester against the State of Washington?

A. I am.

Q. 2. Did you some time in January, 1855, join with your husband Edmund Sylvester, now deceased, in signing a paper writing running to the territory of Washington, mentioned and referred to in the hereunto annexed answer of the defendant, State of Washington which has been served upon you in this action?

A. Yes, I presume I did.

Q. 3. What money consideration was received therefor?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. Nothing that I know of.

Q. 4. What was the real consideration or condition that induced you to sign the said paper writing?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. Why that they should agree to have the capitol there, that it should be the capitol site, and if it was not used for that purpose it should come back to us.

Q. 5. Did you on March 21st, 1893, execute and deliver to
126 the State of Washington a deed for the tract of land in dispute in this suit?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial.

A. Yes, I did.

Q. 6. Was any money consideration received by you for said deed?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. No.

Q. 7. What was the real consideration that induced you to execute said deed?

A. Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. That it should continue to be used as a capitol and if not that it should revert back to the heirs.

CLARA E. SYLVESTER.

127 STATE OF WASHINGTON,
County of King, ss:

I, Willard L. Read, Notary Public in and for the State of Washington, residing at Seattle, in said county, do hereby certify that:

The annexed deposition of Mrs. Clara E. Sylvester, on behalf of plaintiffs in the suit of Clara E. Sylvester *et al.* against the State of Washington, Substituted as defendant etc., was taken by me and reduced to writing by me, at Seattle, in said county and state, on the 24 day of November, 1905, at 10 o'clock A. M., in pursuance of the notice to take such deposition hereto attached. That Robert F. Booth appeared at said hearing for the State of Washington and requested that said deposition be taken at said time and place, and expressly waived all objection to the time and place and notice of taking said deposition.

The said Clara E. Sylvester, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth. And that said deposition was carefully read to said witness, and then subscribed by her.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this 24 day of November, 1905.

[Seal Willard L. Read, Notary Public, State of Washington. Commission Expires Dec. 1, 1907.]

WILLARD L. READ,
Notary Public in and for the State of Washington, Residing at Seattle.

Notary's fees 2.00
P'd by Pl'ffs.

WILLARD L. READ,
Notary Public.

[Endorsed:] Notary's Cert.

128 In the Superior Court of the State of Washington for Thurston County.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON, Defendant (Substituted for A. B. Allison and —— Allison, His Wife, Defendants).

Answer.

Come now the defendant, the State of Washington, and for answer to the complaint of the plaintiffs:

I.

Denies paragraph 1 of plaintiffs' complaint and each and every part thereof and each and every fact therein alleged.

II.

Denies paragraph II of said complaint and each and every part thereof except that it admits that it claims an interest in and to

said premises, but denies that its claim or interest is unfounded or without right.

III.

For answe- to paragraph III of said complaint this defendant alleges that the said land, separate from the improvements thereon, is of the value of $10,000.00, but of no greater value and that the improvements thereon are of the approximate value of $23,200.00, otherwise defendant denies said paragraph.

IV.

For answer to paragraph IV of said complaint this defendant admits that Clara E. Sylvester and May L. Sylvester are the widow and daughter, respectively, of said Edmund Sylvester, and are the sole heirs of said Edmund Sylvester, but as to the other matters and things set up in said paragraph IV, this defendant alleges it
129 has no knowledge or information sufficient to form a belief and therefore denies the same, and particularly denies that the plaintiffs or either of them have any right, title or interest of any kind or character whatsoever in and to said property by virtue of said patent or otherwise or by virtue of said acts or otherwise.

For a further answer and first affirmative defense to plaintiffs' cause of action this defendant, the State of Washington alleges:

I.

That said land- described in paragraph I of plaintiffs' complaint, to-wit:

"Commencing at a point south twenty-four degrees twenty-three minutes west nineteen and ten one-hundredths chains from the northwest corner of Main and Union Streets, in the City of Olympia, Thurston County; thence south seven chains and fifty links; thence west eight chains and fifty eight links; thence north forty seven degrees west one chain and seventy-three links; thence north forty eight degrees thirty minutes west one chain and sixty links; thence north sixty five degrees west one chain and ninety three links; thence north thirty three degrees thirty minutes west two chains and eighty links; thence north thirty eight degrees west one chain and seventeen links; thence north forty five degrees west one chain and eighty-seven links; thence east sixteen chains and four links more or less to the place of beginning, containing ten acres more or less, and being a part of Donation Claim No. 47 of Edmund Sylvester;" are part of lands settled upon by one Edmund Sylvester on February 1, 1850, and which lands, under and by virtue of and in compliance with an act of Congress, approved September 27, 1850, entitled, "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey
130 and to make donations of the public lands;" and the amendatory acts thereof approved February 14, 1853, and July 17, 1854, were patented to said Edmund Sylvester, as Donation Claim No. 47.

II.

That on January 18, 1855, in accordance with an act of the Territorial Legislature of Washington, entitled, "An act to provide for the selection of the place for the location of the seat of government for the Territory of Washington," passed January 9, 1855, the said Edmund Sylvester, under and by virtue of the federal statutes, and his wife, Clara E. Sylvester, one of the plaintiffs herein, made, executed and delivered to the Territory of Washington, a deed in the following words and figures, to-wit:

"This Indenture made and entered into this eighteenth day of January, in the year of our Lord one thousand eight hundred and fifty five, between Edmund Sylvester and Clara E., his wife, of the County of Thurston and Territory of Washington, of the first part, and the Territory of Washington, of the second part,

Witnesseth, That for and in consideration of the sum of One dollar to them the said party of the first part in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, hath this day bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, all that certain lot, piece or parcel of land, *on* the land claim of the said party of the first part, in the County of Thurston and Territory of Washington, in section twenty three (23) Township eighteen (18) North, Range two (2) west, containing ten (10) acres and more particularly described as follows—Commencing at a point South twenty-four (24) degrees twenty three (23) min. W. Nineteen (19) and ten (10) hundredths chains from the northwest corner of Main and Union Streets—thence South seven (7) chains and fifty (50) links—thence west eight (8) chains and fifty eight (58) links—thence north forty seven deg. west, one (1) chain and seventy three (73) links—thence North forty eight (48) deg. thirty (30) min. west one (1) chain and sixty links—thence north sixty five (65) deg. west one (1) chain and ninety three links, thence North thirty three deg. (33) thirty (30) min. west two (2) chains and eighty (80) links—thence North thirty eight (38) deg. west one (1) chain and seventeen (17) links, thence north forty five (45) degrees west one (1) chain and eighty seven (87) links, thence east sixteen (16) chains and four (4) links to place of beginning.

To have and to hold the same, to the said party of the second part, forever free of any claim of the said party of the first
131 part, their heirs and assigns, or any or all persons claiming by, through, from or under them or any of them.

In testimony whereof the said party of the first part hath hereunto set their hands and affixed their seals the day and year first above written.

(Signed) EDMUND SYLVESTER. [SEAL.]
CLARA E. SYLVESTER. [SEAL.]

Signed and delivered in the presence of
Attest:
B. F. KENDALL.
ELWOOD EVANS.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Personally appeared before me at the said Olympia on the twentieth day of January, year 1855, the above named Edmund Sylvester, who signed and sealed the foregoing instrument in writing, and acknowledged the same to be his free act and deed, and also on the same day and at the same place personally appeared before me the above named Clara E. Sylvester, wife of the said Edmund Sylvester, who signed and sealed the foregoing instrument in writing, and being examined by me separate and apart from her husband and had made known to her by me the contents of the above instrument in writing acknowledged the same to be her free act and deed for the purposes therein mentioned, and that she executed the same voluntarily of her own free will and without fear or coercion from her husband.

Before me,

B. F. KENDALL, [SEAL.]
Notary Public.

Recorded here April 26th, 1858.

WILLIAM WRIGHT, *Co. Rec.*,
By A. I. MOSES, *Deputy.*"

That said deed was duly recorded in volume 3 of Deed Records at page 34 in the Auditor's office, Thurston county, Washington, on April 26, 1858.

III.

That at the time, to-wit, January 18, 1855, that the said Edmund Sylvester and Clara E. Sylvester, his wife, made, executed and delivered said deed, heretofore set out, to the Territory of Washington, the said Edmund Sylvester, who at all times was a qualified claimant under said federal statutes, had filed his notification No. 44 for said lands and had resided upon and cultivated said lands for more than four years continuously after the said date of settlement thereon.

IV.

That immediately thereafter the Territory of Washington entered into possession of said land, described in said deed heretofore
132 set out, conveyed, to-wit, by said Edmund Sylvester and wife, and in 1856 the said Territory of Washington caused to be erected upon said land a legislative assembly building for the Territory of Washington, and that from the time of taking possession of said tract by the Territory of Washington in 1855 to the present time, the possession of the said tract by the Territory of Washington, and its successor, the State of Washington, defendant herein, has been actual, open, notorious and continuous, and that the said Territory of Washington and its successor, the State of Washington, defendant herein, has been actual, open, notorious and continuous, and that the said Territory of Washington and its successor, the State

of Washington, has in good faith, from the time said Territory of Washington, took possession of said tract on Jan. 18, 1855, to the present time, been in the actual, open, notorious and continuous possession of said described tract, and that said tract has, from the time it was taken possession of by the Territory of Washington in 1855 to the present time, been used as a capitol site for the Territory and State of Washington; that said property has at all times been treated as the property of the State and no taxes assessed against the same, and therefore none to pay, and that neither the Territory of Washington, nor its successor, the State of Washington, defendant herein, have ever sold or conveyed to any one any interest whatever in said property.

V.

That the plaintiffs in this action have no right, title or interest of any kind or character in and to said property set up in their complaint, and the State of Washington succeeded to the rights of the Territory of Washington, and this defendant, by virtue of
133 said conveyance to the Territory of Washington by Edmund Sylvester and Clara E. Sylvester, his wife, and the actual, open, notorious and continuous possession of said tract, as heretofore alleged, or by either of said facts and things, has acquired a good and sufficient title in fee simple to said property.

Wherefore, the defendant, the State of Washington, prays that this action be dismissed, that the *plaintiffs* go hence without day, that it be declared to be the absolute owner in fee simple of said described premises, and that it be granted such other and further relief herein of any kind and character sufficient and necessary to declare it the owner in fee simple to said property and that it recover its costs and disbursements herein.

For a further and second affirmative defense the defendant herein, the State of Washington, alleges:

I.

That the Territory of Washington and its successor, the State of Washington, has been in the actual, open, notorious and continuous possession of said property described in plaintiffs' complaint in paragraph I., to-wit:

"Commencing at a point south twenty-four degrees twenty three minutes west nineteen and ten one-hundredths chains from the northwest corner of Main and Union Streets, in the City of Olympia, Thurston county; thence south seven chains and fifty links; thence west eight chains and fifty eight links; thence north forty seven degrees west one ch-in and seventy three links; thence north forty eight degrees thirty minutes west one chain and sixty links; thence north sixty five degrees west one chain and ninety-three links; thence north thirty three degrees thirty minutes west two chains and eighty links; thence north thirty eight degrees west one chain and seventeen links; thence north forty five degrees west one chain and eighty-seven links; thence east sixteen chains and four links more or less to the

place of beginning, containing ten acres more or less, and being a part of Donation Claim No. 47 of Edmund Sylvester,"

for more than seven successive years, to-wit, from the 18th day of January, 1855, and that this defendant has a connected title to said land in law and in equity deducible of record from the United States, to-wit: a good and sufficient conveyance to said property
134 from Edmund Sylvester and Clara E. Sylvester, his wife, the said Edmund Sylvester and Clara E. Sylvester, his wife, the said Edmund Sylvester having acquired title to said property directly from the United States under and by virtue of the Federal Statutes and laws thereof and conveyed said property to the Territory of Washington on the 18th day of January, 1855, from which date the Territory of Washington and the State of Washington has been in such actual, open, and notorious possession of the same.

II.

That neither the plaintiffs nor their ancestors, predecessors or grantors have been seized or possessed of said premises set up in paragraph I of said complaint, being the lands and premises in question, within ten years before the commencement of this action.

III.

That the plaintiffs have not brought their action within seven years next after the possession having been taken by the Territory of Washington or this defendant, its successor, as aforesaid, and the time limited by law within which the plaintiffs could maintain their action has expired and the statutes of limitation have run against their right to maintain this action and the plaintiffs have not brought this action within the time limited by law, and this defendant herein and now pleads as a bar to the right of the plaintiffs to maintain this action, the statute of limitations, and alleges that the plaintiffs have not brought their action within the time limited by law.

Wherefore, this defendant prays that this action be dismissed, that this defendant be granted his costs and disbursements herein and such other and further relief as the facts herein may entitle him.

For a counter claim herein this defendant alleges:

I.

That the property herein described in paragraph I of plain-
135 tiffs complaint is property in which this defendant has and asserts a fee simple title by virtue of a deed to the Territory of Washington to said property from said Edmund Sylvester and Clara E. Sylvester, his wife, made, executed and delivered January 18, 1855, at which time the said Edmund Sylvester and Clara E. Sylvester, his wife, had full and legal title thereto with the right to convey the same by virtue of settlement, residence and cultivation thereon under the various acts of Congress, known as the Oregon Donation Act and amenda-ry acts thereof, heretofore set out in other parts of this answer, and that upon taking possession of said

property in 1855 this defendant thereafter in 1856 in good faith constructed and erected permanent improvements thereon, consisting of a legislative assembly building of the present value of $1,000,00, and thereafter caused to be constructed, partially upon said land, set up in paragraph I of plaintiffs' complaint and partially upon a tract of land consisting of two acres lying directly north of said tract, a large and expensive basement upon which to erect a capitol for the State of Washington; that said basement is approximately one-half upon the land described in plaintiffs' complaint and has been looked after and cared for and preserved by the State of Washington, and was constructed at an expense of $47,400, exclusive of plans, etc., and the defendant alleges that the present value of said basement is $47,400, one-half of which amount approximately represents the value of so much of said basement as is constructed upon the lands set up in paragraph I of plaintiffs' complaint.

II.

That the land set up in paragraph I of plaintiffs' complaint separate and apart from the permanent improvements thereon
136 are of no greater value than $10,000.

Wherefore this defendant prays that in any event, though not in anywise conceding that the plaintiffs have any right, title or interest of any kind or character in and to said property, that should a judgment or verdict be found against this defendant that the value of the improvements placed upon said land by the defendant be specifically found and that this defendant recover, as provided by law, the value of said improvements.

Wherefore this defendant prays generally that this action of the plaintiffs be dismissed, that they go hence without day, that this defendant be allowed all equitable and legal relief herein, and all relief which the facts may show it entitled to, that it recover its costs and disbursements herein and that in any event it be allowed the value of its permanent improvements.

[Endorsed:] Answer.
137 [Endorsed:] #3084. Pl'ffs Exhibit 16. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

138 Attorney General- Office.

Olympia, Washington, *March* 18, 1893.

Hon. John H. McGraw, Governor.

Dear Sir: Regarding the title to the present Capitol ground of the State of Washington, proposed as the site for the capitol to be erected pursuant to House Bill No. 292, I beg leave to report the following:

The State, formerly Territory, of Washington received its title to ten acres of the proposed site from Edmund Sylvester of Olympia, by a bargain and sale deed dated January 18, 1855, and recorded

April 26, 1858. The then Territory of Washington entered into possession of the tract, and in 1856 the Legislative Assembly building was erected. From that time to the present the possession of the Territory, now State, has been continuous.

At the time of his conveyance to the territory the grantor Sylvester was in possession of the premises as a settler under the Donation Act, but had not yet applied for or received his patent, which was not issued till May 3, 1860.

Three years prior to his conveyance to the Territory, May 11, 1852, he had given a quitclaim deed to one Quincy A. Brooks, of an eighty-acre tract that included the present capitol site. This deed contained a covenant to convey by a warranty deed, within twenty days after the said Sylvester should receive patent from the United States. Brooks executed a similar deed to one Luman H. Calkins, for a thirty-acre tract embracing the present capitol site, and Calkins quit-claimed the present capitol site to the Territory, January 16, 1855, about the time Sylvester gave his deed to the Territory. Within a few days prior, however, to executing
139 his deed to the Territory, Calkins had conveyed five one-acre tracts lying partly or wholly within the capitol grounds. Some of these grantees have quit-claimed to the Territory; others have strengthened their title by warranty deeds from Sylvester before he received his patent, or by quitclaims since.

The fact that the possession of the State has been open, notorious, continuous, unquestioned, with claim of right under color of title and with universal acquiescence of the public and all parties interested, does not do away with the necessity of investigating the validity of these various conveyances and determining where they place the title.

Adverse possession, where it is established, gives the citizen perfect title. It can, however, according to eminent authority, give no title to a sovereign who does not permit himself to be sued. The Statute of Limitations does not begin to run till an action can be brought. The Commonwealth of Washington, whether as Territory or State, has never suffered itself to be made party generally to actions, or specially, so that claimants to this tract could have brought the State into court. These parties, therefore, have been under a continuous disability, and as to them the Statute of Limitations has not begun to run. This exemption of the State from suit, though depriving it of the advantage of gaining title by adverse possession, practically gives it no protection from attack if its original title is vulnerable. Though the State cannot be sued, its agents and servants can be, and as the State can hold possession of real estate as well as do all other things only through its agents and servants, it is subject to dispossession by the eviction of its officers and agents at all times unless its title is without a blemish.

The long continued possession of the State and its devotion of this tract to capitol purposes may fairly be deemed to establish a
140 dedication by all interested parties of the land to that purpose. Although at common law dedications for highway purposes alone were recognized, in the United States the doctrine has re-

ceived a wider application, and dedications may be for squares, parks and public buildings, as well as for highways. Inasmuch as in this case the dedication would be implied, and the law is not well defined as to what period of time and what character and extent of use will establish a dedication by implication for a particular purpose, it will not do for the State to rely on such a dedication to reinforce a title otherwise weak.

Edmund Sylvester began his settlement February 1, 1850. The original Donation Act of September 27, 1850, forbade contracts for sale before patent, declaring such contracts void. An amendment approved July 17, 1854, repealed this provision with a proviso that sales before four years of residence should be void. The deed from Sylvester to Brooks was therefore void.

The certificate of the Register and Receiver of the U. S. Land office at Olympia, dated July 1, 1858, shows that Sylvester continuously resided upon and cultivated the tract in question for the period of four years required by law, and that his settlement began February 1, 1850. This finding as to Sylvester and all claiming under him is conclusive. The prohibition of sales contained in the original Donation Act and in the amendment of July 17, 1854, applied to those conveyances or contracts of Edmund Sylvester that were made before July 17, 1854, since he had resided four years on the land before February 1, 1854.

The Supreme Court of the United States has repeatedly sustained sales before patent of settlers in Washington and Oregon, not
141 expressly prohibited by the Donation Act and the acts amendatory thereof. That high authority has even held that the repealing act of 1854 was equivalent to an authority to sell. The deed, therefore, from Edmond Sylvester and his wife to the Territory was a valid conveyance, and the antecedent transfer of the same grantor being void, his title was transferred to and became vested in the territory.

Inasmuch as this conveyance to the Territory was a bargain and sale deed without warranty, the legal title that vested in Edmund Sylvester by the patent from the United States did not inure to the Territory. Unless, therefore, the patent is deemed to relate back to a time anterior to the conveyance to the Territory, or it is held that the legal title vested in Sylvester before he deeded to the Territory, the Territory took and the State now holds only the equitable title to the property.

The operative words of the Donation Act are, "There is hereby granted." These words import a present grant and are as effectual as a patent to pass title as soon as there is a qualified grantee. It has been argued that upon compliance with the statutory requirements as to settlement, residence and cultivation, the settler becomes a qualified grantee, the words of the statute at once become operative and the title passes. This construction of the statute has received the approval of the Supreme Court of Oregon and the Supreme Court of the Territory of Washington. The Supreme Court of this state has within a few months cogently sustained this interpretation. The Supreme Court of the United States, in deciding

79

another question arising under this Act, has, in the course of its argument, used this same line of reasoning. It might seem, therefore, that when the question comes fairly before the Supreme Court
142 of the United States for adjudication, that tribunal will hold that the title vests by the operation of the Act when the four years of continuous cultivation and residence are completed.

An amendatory act of February 14, 1853, however, required all settlers to file notifications of their respective claims with the Surveyor General, before December 1, 1853. The object of this requirement was evidently to enable the land officers of the United States to ascertain promptly what claims would be made under the Donation Act, to the end that fraud might be detected, conflicts prevented or adjusted, and the land to be granted segregated from the public land.

Certainly as to the land conveyed being essential to a deed and important in the case of all grants, the requirement of notification would seem to be a pre-requisite to the vesting of the title. The Supreme Court of the United States, in a recent decision, inclines to this view. I have been unable to learn when Edmund Sylvester filed his notification with the Surveyor General. The records of the Olympia and Seattle land offices are silent. Of course, the presumption, from the general recitals of the patent, is that the notification was filed before December 1, 1853. This presumption should not be relied on until it is found out that the date of the notification cannot be ascertained. If the notification was filed in time Edmund Sylvester had the legal title at the time he and his wife conveyed to the Territory. Otherwise, he had only the equitable title.

A patent under the Donation Act relates back to the time the patentee is entitled to it,—that is, to the time when he proves up and receives his certificate. Sylvester received his certificate July 1, 1858, three years after his deed to the Territory; therefore,
143 his legal title under the patent did not pass by relation to the Territory.

The constitution transferred all the title of the Territory to the State.

Assuming that the title of the State is an equitable one, the holders of the legal estate are simply trustees from whom the state is entitled to conveyances. The legal title to most of this tract is in the legal representatives of Edmund Sylvester. All other holders of title have purchased since the Territory took possession and built the so-called Capitol. These, therefore, have had full notice of the rights and title of the Territory, and hold their bare legal title simply as trustees for the State.

A two-acre tract adjoins the original ten-acre tract on the north. This was conveyed to the Territory by Edmund Sylvester and his wife by warranty deed dated April 26, 1858. The legal title to this tract under the warranty inured to the Territory as soon as Sylvester received the legal title, and that title has passed to the State.

I am of the opinion that the State has an indefeasible legal title

to the two-acre tract last mentioned, and an indefeasible legal or equitable title to the ten-acre tract; that if the title of the State is equitable, there is nothing but the bare legal title without beneficial interest outstanding; the possession of the State and its officers cannot be interfered with; the State is entitled to deeds from the holders of the legal title without further expense than the cost of the conveyances, and on refusal of such holders to execute the same they can be compelled to execute them or their titles may be appropriated under condemnation proceedings with no more than a
144 nominal award.

I have prepared the requisite deeds to invest the State beyond all question with the full legal title, and I am informed that their execution is being secured and that they will be at an early date delivered to the State.

Very respectfully, JAMES A. HAIGHT,
Assistant Attorney General.

[Endorsed:] Pl'ff's Iden. Exhibit 17. # 3084. Filed in Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

145 4–207*r*.

B. DEPARTMENT OF THE INTERIOR.
M. F. H. GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 19, 1904.

I hereby certify that the annexed copies of papers are true and literal exemplifications of the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

C. H. BRUSH,
Recorder of the General Land Office.

146 *Proof of Commencement of Residence and Cultivation on Land not yet Surveyed.*

Isaac N. Ebey of Thurston county in the Territory of Washington being first duly sworn, says that he is in no way interested in the tract of land claimed as a donation by Edmund Sylvester and particularly described in the annexed notification to the Surveyor General of Oregon; that he is personally acquainted with said Edmund Sylvester and knows that he has personally resided upon and cultivated said tract of land continuously from the 25th day of February 1850 to the First day of November 1853.

I. M. EBEY.

Subscribed and sworn to before me, this 1st day of Nov. 1853, in ——.

EDWARD LANDER,
Ch'f Justice Washington Territory.

John M. Swan of Thurston county in the Territory of Washington, being first duly sworn says that he is in no way interested in the tract of land claimed as a donation right by Edward Sylvester and particularly described in the annexed notification to the Surveyor General of Oregon; that he is personally acquainted with said Edmund Sylvester and knows that he has personally resided upon and cultivated said tract of land continuously from the 25th day of February 1850 to the First day of November 1853.

JOHN M. SWAN.

Subscribed and sworn to before me, this 1st day of Nov, 1853, in ——.

EDWARD LANDER,
Ch'f Justice Washington Territory.

147 *Affidavit of Settlers on Unsurveyed Lands, Claiming Under the 4th Section of Act of 27th September,* 1850.

Edward Sylvester of Thurston County, in the Territory of Washington being first duly sworn, says that he is a white settler on the public lands in that part of Oregon, now established as the Territory of Washington, and that he arrived in Oregon on the Fifteenth day of September 1843 and was a resident thereof on and before the 1st day of December 1850; that he is a single man & his heir at law is his Sister Mary T. Sylvester now residing at Deer Isle, Hancock Co. State of Maine, and that he was born in Hancock county Maine in the year 1821; that he has personally resided upon and cultivated that part of the public land in that part of Oregon, now established as the Territory of Washington, particularly described in the annexed notification to the Surveyor General of Oregon continuously, from the First day of January 1850 to the First day of November 1853.

EDWARD SYLVESTER.

Subscribed and sworn to before — this — day of ——, 18—, in ——.

EDWARD LANDER,
Ch'f Justice Washington Territory.

M. L.

148 No. 44. No. 44.

Notification to Surveyor General of Oregon on the Settlement of Public Land in Township 18, *N. R.* 2, *W.*

Pursuant to the Act of Congress approved on the 27th day of September, 1850, entitled, "An Act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the Survey and make Donations to Settlers of the Public Lands—

I, Edmund Sylvester of Thurston Co., in the Territory of Washington (formerly Oregon) hereby give notice of my claim to dona-

tion of 320 acres of Land, known and designated in the Surveys and Plats of the United States as a part of secs. 14, 22 & 23, in T. 18 N. R. 2, W., bounded and particularly described as follows: beginning at a stake marked "B" being the N. E. Corner of said claim which bears
S. 21° E. 9.75 ch.
South 13.56 "
S. 17° W. 10.20 "
S. 43° W. 13.65 " from the meander post on the East side of Budd's Inlet as the intersection of the section line between secs. 11 & 14, T. 18 N. R. 2 W. with said Inlet running thence along the meander of Budd's Inlet as established by the U. S. Surveys N. 46° W. 25.18 chs.
S. 42° ¾ W. 20.00 "
S. 3° E. 40.35 " to the meander post between Secs. 14 & 23 thence S. 3° E. 3.15 chs.
" S. 65° 15′ W. 21.10 chs.
" S. 8° 15′ E. 4.57 "
" S. 19° E. 11.53 "
149 thence S. 4° 18′ E. 6.30 chs.
" S. 25° 45′ E. 5.13 "
" S. 5° 30′ E. 4.75 " to the S. W. corner of said claim " East 41.00 " to the S. E. corner of said claim which is due south from the stake marked "B" at the N. E. corner of said claim thence North 80.50 chas. to the place of beginning containing 320 acres, and including within the above boundaries the town of Olympia.

EDMUND SYLVESTER.

Oregon City, 13th February 1854.

No. 44.

Edmund Sylvester of Thurston County, in the Territory of Washington being first duly sworn, says that he is a white settler on public lands in Washington Territory formerly Oregon Territory that he arrived in said Territory on the 10th day of September 1843, that he was a resident thereof between the 27th day of September, and the 1st day of December, 1850, and above the age of 18 years, on the 1st day of December, 1850, and that he is a native born citizen of the United States: and that he was born in Hancock Co. Maine in the year 1820 that he has personally resided upon and cultivated that part of the public lands in Oregon Now Washington Territory particularly described in notification No. — hereunto annexed, continuously, from the 1st day of January 1850 to the 13th day of February 1854. And he further says that he is not a married man.

EDMUND SYLVESTER.

Subscribed and sworn to before me, in Oregon City this 13" day of February 1854.

C. K. GARDNER,
Surv. Gen. of Oregon.

150 No. 44.

John M. Swan of Thurston county in the Territory of Washington, being first duly sworn, says that he is in no way interested in the tract of land claimed as a donation by Edmund Sylvester and particularly described in the annexed notification to the Surveyor General of Oregon No. 44; that he is personally acquainted with said Edmund Sylvester and knows that he has personally resided upon and cultivated said tract of land continuously from the 1st day of February 1850 to the 25th day of March 1854.

JOHN M. SWAN.

Subscribed and sworn to before me, this 25th day of March 1854 in Olympia. Witness my hand and official Seal.

[SEAL.] J. W. GOODELL,
Notary Public.

No. —.

George Blanchet of Thurston county in the Territory of Washington being first duly sworn says that he is in no way interested in the tract of land claimed as a donation right by Edmund Sylvester and particularly described in the annexed notification to the Surveyor General of Oregon No. 44; that he is personally acquainted with said Edmund Sylvester and knows that he has personally resided upon and cultivated said tract of land continuously from the 1st day of February 1850 to the 25th day of March 1854.

G. BLANCHET.

Subscribed and sworn to before me, this 25 day of March 1854 in Olympia. Witness my hand and official Seal.

[SEAL.] J. W. GOODELL,
Notary Public.

151 SECRETARY'S OFFICE,
OLYMPIA, WASHINGTON TERRITORY.

I, Charles H. Mason, Secretary of the Territory of Washington do hereby certify that before and on the 24th day of March *Anno Domini* 1854, Jonathan W. Goodell, whose official signature and seal was attached to the foregoing affidavits, was a legally commissioned and qualified Notary Public in and for the County of Thurston and Territory aforesaid, duly authorized by law to administer oaths therein, that his signature and Seal as filed in this office, lead to the belief that said acts are duly performed in virtue of his office as aforesaid, and that full faith and credit may be given to his official attestation, &

In testimony whereof I have hereunto affixed my hand and the Seal of the said Territory of Washington at Olympia the First day of October A. D. 1858.

[SEAL.] C. H. MASON,
Sec'y Wash. Ter.

152 Donation. Certificate No. 73.

Notification No. 44.

Whereas, In conformity with the provisions of the 7th Section of the Act of Congress, approved September 27, 1850, entitled, "An Act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey, and to make donations to settlers of the Public Lands," and the amendments thereto, Edward Sylvester of the county of Thurston in the Territory of Washington, claiming a Donation Right, in virtue of the Act aforesaid, to a certain tract of Public Lands, known and designated in the Surveys and Plats of the United States, claim Number (*47*) *forty seven*, situated in Sections No-. (14) fourteen and twenty three (23) in Township No. (18) eighteen North of Range (2) two west of the Willamette Meridian containing three hundred and twenty acres, having proven to the satisfaction of the Register and Receiver of Washington Territory, the fact that such settlement was commenced on the 1st day of February 1850 more than four years prior to the date hereof; and having in pursuance of the requirements of the 7th Section of the act aforesaid, established by two disinterested witnesses, the fact of continued residence and cultivation, required by the 4th section of the said act; now, therefore, be it known, That we, Wm. A. Strickler and S. Garfielde register and receiver of Public Land in said Territory do hereby, and pursuant to the 7th Section of the act aforesaid certify to the Commissioner of the General Land Office, the facts aforesaid, accompanied by the evidence thereof, in order that a patent may be issued to said claimant for the tract of land described, as required by the 7th section of the act aforesaid: Provided, The said Commissioner shall find no valid objection thereto.

153 Given under our Hands, at the Land Office in Olympia, for the District of Washington Territory, this first day of July 1858.

WM. A. STRICKLER, *Register.*
S. GARFIELDE, *Receiver.*

M. L.

154 [Endorsed:] #3084. P'ffs' Exhibit 18. Filed in Supreme Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

155 OFFICE OF THE SURVEYOR GENERAL,
STATE OF OREGON, *November* 20, 1905.

I hereby certify that I have examined the records of this office, and there is nothing therein to indicate that any notice or notification of any kind or character was ever filed in this office concerning the donation claim of Edmund Sylvester, located in Sections 14 and 23, Township 18 North, Range 2 West, W. M. There is nothing in this office to indicate that said Edmund Sylvester ever settled upon, resided upon, claimed, or offered or made final proof under the Donation Act to the aforesaid land, or any other land whatsoever.

In witness whereof I hereby set my hand this 20 day of November A. D. 1905, at Portland, Oregon.

[Seal Surveyor General's Office, Oregon.]

JNO. D. DALY,
Surveyor General.

156 [Endorsed:] Pff Exhibit 19. #3084. Filed In Superior Court Thurston Co., Wash., Nov. 28, 1905. B. T. Baker, Clerk.

157 In the Superior Court of Washington in and for the County of Thurston.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON (Substituted for A. B. Allison *et ux.*), Defendant.

To the above named defendant and to John D. Atkinson, Attorney General, A. J. Faulknor, and Robert Booth, as attorneys of record:

You and each of you are hereby notified that the hereto attached motion will be called up for hearing before the Court at Olympia, in said County, on the 11th day of September, A. D. 1906 at the hour of ten A. M. or as soon thereafter as counsel can be heard.

GEO. M. SAVAGE AND
MAY L. SYLVESTER,
Att'ys for Plaintiffs.

Service accepted.

JOHN D. ATKINSON,
A. J. FAULKNOR,
ROB'T F. BOOTH,
Attorneys for Defendant.

158 In the Superior Court of Washington in and for Thurston County.

MRS. CLARA E. SYLVESTER & MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON (Substituted for A. B. Allison *et ux.*), Defendant.

Motion.

Come now the plaintiffs above named by their attorneys and move the Court for an order permitting plaintiffs to file the hereto annexed affidavit of G. M. Savage, and the thereto annexed exhibits in support of plaintiffs' motion for a new trial.

GEO. M. SAVAGE AND
MAY L. SYLVESTER,
Attorneys for Plaintiffs.

Service by copy accepted this 6th day of September 1906.

JOHN D. ATKINSON,
A. J. FALKNOR &
ROB'T F. BOOTH,
Att'y Gen'l and Assistants,
Att-s for Defendant.

159 In the Superior Court of Washington in and for Thurston County.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs,
vs.
THE STATE OF WASHINGTON (Substituted for A. B. Alison *et ux.*), Defendant.

Affidavit.

STATE OF WASHINGTON,
County of King, ss:

George M. Savage, bein- first duly sworn on his oath says that during the pendency of this suit has been and now is one of — attorneys of record for the plaintiffs in the above entitled suit, that at the trial of said action defendant's attorney admitted in open court that notification No. 44 was filed by Edmund Sylvester in the United States Land Office at Olympia W. T. That to the surprise of plaintiffs on the — day of May 1906 the Court refused to make a finding of fact asked by plaintiff- to the effect that "Subsequent to the 22nd day of April 1857 said Edmund Sylvester, filed his notification No. 44 * * *" etc.

That affiant is informed and believes and so states the fact to be that plaintiffs are now able to prove that Edmund Sylvester could not have filed his Notification with the Surveyor general of Washington Territory before the 18th day of January 1855, for the reason that the Surveyor General of Washington Territory was delayed in his journey aroun- Cape Horn and did not arrive in Olympia, Wash., until after said 18th day of January 1855 and the office of the Surveyor General of the Territory of Washington was not opened for the transaction of business until after said date.

Affiant further says that he has been unable to find any record showing when Notification No. forty four was filed but that the hereto attached paper marked Ex. A is a true copy of the notification No. 43 which must have been filed prior to the filing of Notification No. 44 and shows that it could not have been filed before Jan. 29th 1858.

That the hereto attached paper marked Ex. B is a true and literal copy of a letter from the Commissioner or the Gen. Land Office to the Register of the U. S. Land Office at Olympia W. T.

That the papers marked Ex. A & B did not come — plaintiffs knowledge nor to the knowledge of affiant until about July 22nd 1906 when they were accompanied by a letter from the Commis-

sioner of the General Land Office notifying affiant that two letters and their accompanying documents seemed to have been lost but that the office force were making a thorough search for them and if they were found he would notify affiant of the fact, that affiant has delayed making this affidavit until the present time in expectation of receiving further information. That the facts contained in Ex. A & B & hereto attached contain new evidence material to the issues in this case.

And further affiant says not.

GEORGE M. SAVAGE.

Subscribed and sworn to before me this 6th day of September 1906.

[Seal John B. Clayton, Notary Public, State of Washington.]

JOHN B. CLAYTON,
Notary Public for Washington, Residing at Seattle.

Commission expires Jan. 14, 1908.

Service by copy accepted this 6th day of September 1906.

____ ____.
____ ____.
____ ____.

160 No. 3826.

Notification to Surveyor General of Oregon on the Settlement of Public Lands in Township Seventeen, North Range One (1) West.

Pursuant to the Act of Congress, approved on the 27th day of September, 1850, entitled "An Act to create the office of Surveyor General of the public lands in Oregon, and to provide for the survey and make donations to settlers of the Public Lands"—

I, William J. Yeager for myself and my wife, Mary Ann, of Thurston Co., in the Territory of Washington, hereby give notice of my claim to donation of three hundred and twenty (320) acres of land, known and designated in the Surveys and Plats of the United States as the N. ½ of the N. E. ¼ of Sec. 26 & the S. ½ of the S. E. ¼ of Sec. 23 & the N. ½ of the N. W. ¼ of Sec. 25 & the W. ½ of the N. ½ of N. E. ¼ of Sec. 25 & the W. ½ of the S. ½ of the S. W. ¼ of Sec. 24.

WM. J. YEAGER.

Attest:
D. R. BIGELOW.

P. O. Olympia, Thurston Co., W. T.
A.

161 No. 43.

Wm. J. Yeager of Thurston County in the Territory of Washington, being first duly sworn, says that he is a white settler on public lands in said Territory; that he arrived in said Territory on the twentieth day of March, 1853; and that he was born in Indiana in the year 1828, that he has personally resided upon and cultivated that part of the public lands in Washington Territory, particularly described in Notification No. 43, hereunto annexed, continuously from the 8th day of November, 1853, to the last day of November, 1857, except when it was dangerous to reside on his claim in consequence of Indian Hostilities in the Country.

WM. J. YEAGER.

Subscribed and sworn to before me, in Olympia, W. T. this 29th day of January, 1858.

W. A. STRICKLER, *Register.*

162 GENERAL LAND OFFICE, *July* 16, 1859.

Register of the Land Office, Olympia, Washington Territory.

SIR: Yours of 6th April last, enclosing Donation Certificate No. 73—with proofs, in favor of Edmund Sylvester is received; also a package containing copies of same papers, certified by you on the 9th May last.

It appears from the notification in the case that Sylvester claims the site of the present Town of Olympia as a part of his Donation. We find the claim laid down on the plat of Township 18 N., R. 2 West, as embracing the Town site, and the Certificate recognizes his claim according to the notification.

With these facts before us, and Townsite being by law exempted from donation, it becomes necessary that we should know the authority upon which the Register and Receiver acted in thus including the Town site in a Donatio- claim, and whether the authorities of said Town set up a claim to any portion of the premises as a *Townsite* or whether the property within the Town is held under Sylvester.

In this view you are requested to make an early report to this office of the facts in relation to the rights of the Town in connection with the claim of Sylvester presenting the information in authentic form, so as to enable the Department to act definitely in the matter.

Very respectfully, Your Obt. Servt.,

THOS. A. HENDRICK,
Commissioner.

E. R. B.

"B."

[Endorsed:] #3084. Sylvester *et al. vs.* State of Wash. Filed in Superior Court Thurston Co., Wash., Sep. 11, 1906. B. T. Baker, Clerk.

163 In the Superior Court of Washington in and for Thurston Co.

Mrs. Clara E. Sylvester and May L. Sylvester, Plaintiffs,
vs.
The State of Washington (Substituted for A. B. Allison *et ux.*),
Defendant.

Comes now the plaintiffs above named and asks leave of court to file the affidavit of George M. Savage, and the thereto annexed exhibits in the above entitled cause to be read in support of plaintiffs' motion for a new trial.

GEORGE M. SAVAGE and
MAY L. SYLVESTER,
Att'ys for Plaintiffs.

Due and legal service accepted this 23rd day of June 1906.
JOHN D. ATKINSON,
A. J. FALKNOR,
ROB'T F. BOOTH,
Att'y- for Defendant.

164 In the Superior Court of Washington in and for Thurston Co.

Mrs. Clara E. Sylvester and May L. Sylvester, Plaintiffs,
vs.
The State of Washington (Substituted for A. B. Allison *et ux.*)
Defendants.

Affidavit.

George M. Savage, being first duly sworn on his oath says That ever since the beginning of the above entitled action he has been and now is an attorney of record in said action.

That at the trial the defendant through and by its attorney of record offered to admit that the Notification of Ed- Sylvester was filed and given in the Olympia Land Office,

That relying on such admission and the knowledge affiant had of the facts, no evidence was offered by plaintiff to show that the Notification No. 44 which describes the Edmund Sylvester Donation Claim was not filed and given in the Office of the Superior General of Oregon.

That plaintiffs wer- surprised when on the 1- day of May 1906 defendant offered a finding to the Court finding that Edmund Sylvester had filed Notification No. 44 in the office of the Surveyor General of Oregon. That on the 22nd day of June affiant received through the United States mail a certified copy of Notification No. 44 filed in the Office of the Surveyor General of Oregon and a description of the land taken by the s-ttler under said notification, a copy whereof is hereto attached, hereby referred to and made a part hereof.

That on defendant's Exhibit *Ex* 3 at the bottom of that part of said exhibit Entitled Notification to the Surveyor General of Oregon" etc. there appears "Notification on Unsurve-d Land No. 454." Exhibit No. 3, was admitted in evidence over plaintiffs' objection, they challenging the correctness of said exhibit. That the phrase "Notification on Unsurve-d land No. 454" does not appear on the same document which is a part of plaintiffs' Exhibit 18, and plaintiff had no means of knowing that it would appear on defendant's exhibit.

That only after long search was plaintiffs able to show what Notification No. 454 Oregon Land office was.

That affiant received through the United States Mail on the 22nd day of June 1906 a copy of Notification No. 454 which is hereto attached marked Ex. "B" made a part hereof.

'EORGE M. SAVAGE.

STATE OF WASHINGTON,
County of King, ss:

George M. Savage being first duly sworn, on oath says that he has read the foregoing affidavit knows the contents thereof and believes the same to be true.

GEORGE M. SAVAGE.

Subscribed and sworn to before me this 22nd day of June 1906.

[Seal Robert D. Hamlin, Notary Public, State of Washington. My commission expires Nov. 24, 1909.]

ROBERT D. HAMLIN,
Notary Public for the State of Washington,
Residing at Seattle.

165 "44."

Description of the Boundary of Wm. T. Patton's Claim of 640 *Acres Lying in Sections No-.* 8, 9, 4 *and* 10 *of Townships* 8, *South Range* 1 *West of the Willamette Meridian.*

To find his corners go to the South East corner of Section 8 of township 8 South Range 1 West of the known meridian; thence West 13.70 chains; thence North 26.87 to his south west or beginning corner; thence West 37½ degrees North 5.17 chains; thence North 16 degrees, East 80.50 chains; thence East 26.23 chains; thence South 48.57 chains; thence East 72.50; thence South 40 chains; thence West 109 chains to the beginning.

Sheet "2."

No. 44.

Notification to the Surveyor General of Oregon, on the Settlement of Public Land, in Township 8, S. Range 1 W.

Pursuant to the act of Congress, approved on the 27th day of September, 1850, entitled, "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey and make Donations to Settlers of the Public Lands," I, William T. Patten, a married man, Marion Co. in the Territory of Oregon, hereby give notice of my claim to Donation of 640 acres of Land, known and designated in the Surveys and Plats of the United States as a part of Sections 4, 5, 8, 9, & 10 in T. 8 S. R. 1 W. particularly described as follows: beginning at a point 26.89 chains north and 13.70 west of the S. East corner of Section 8, T. 8 S. R. 1 W., running thence N. 63 degrees W. 5.17 chs. on Kimsey's line; thence N. 16 degree E. 80.50 chs., to T. Powell's line, thence East 23.00 chs. to May Center's line; thence South 51.00 chs. to May Center's S. W. corner; thence East 70.00 chs. to W. Morley's claim; thence South 36.00 chs., thence West 115.00 chs. along N. B. Wisdom's line to the place of beginning, containing 640 acres.

WILLIAM T. PATTEN.

Oregon City, 25th February, 1852.
W. 1/3 to the wife.

C. K. G. —.

Sheet Three.

No. 44.

William T. Patten of Marion County, in the Territory of Oregon, being first duly sworn, says that he is a white settler on public lands in Oregon, and was a resident thereof on and before the 1st day of December 1850; and above the age of eighteen years on the 1st day of December 1850, that he is a native born citizen of the United States, and that he was born in Franklin County Missouri, in the year 1828, that he has personally resided upon and cultivated
166 that part of the public lands in Oregon particularly described in Notification No. 44, hereunto attached, continuously from the 1st day of November, 1850, to the 25 day of February, 1852. And he further says that he is intermarried with Julia Ann Patten, his wife, and that he was legally married to her on the 30th day of November, 1848, in Marion Co. Oregon.

WILLIAM T. PATTEN.

Subscribed and sworn to before me, this 25 day of Feb'y, 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen. of Oregon.

Sheet No. 4.

No. 44.

Rufus C. Edmunson of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by William T. Patten and particularly described in Notification No. 44, hereunto annexed; that he is personally acquainted with said William T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 30th day of November, 1850 to the 25th day of February, 1852.

RUFUS C. EDMUNSON.

Subscribed and sworn before me, this 25th day of February 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

For sheet No. 5 see next to last sheet.

No. 44.

Reuben Dickens, of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by William T. Patten, and particularly described in Notification No. 44, hereunto annexed; that he is personally acquainted with said Wm. T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 30th day of Nov'r, 1850, to the 25th day of February, 1852.

REUBEN DICKENS.

Subscribed and sworn to before me this 25th day of *Beb'r* 1852 in Oregon City.

JNO. B. PRESTON,
Sur. Gen. of Oregon.

Sheet No. 6.

No. 44.

William T. Patten of Marion County, in the Territory of Oregon being first duly sworn, says that he is a white male settler on the public lands in Oregon, and was a resident thereof on and before the 1st day of December, 1850, and above the age of 18 years on the 1st day of December 1850, that he is a native born citizen of
167 the United States, and that he was born in Franklin County, Missouri in the year 1828, that he has personally resided upon and cultivated that part of the public lands in Oregon particularly described in notification No. 44 hereunto annexed, continuously from the 1st day of November, 1850, to the 28th day of No-

vember, 1854. And he further says that he is intermarried with Julia Ann Patten, his wife, and that he was legally married to her on the 30th day of November, 1848, in Marion County, Oregon.

WILLIAM T. PATTEN.

Subscribed and sworn to before me in Salem, O. T., this 28th day of November, 1854.

C. K. GARDNER,
Sur. Gen'l of Oregon.

Sheet No. 7.

No. 44.

Francis M. Smith of Marion County, in the Territory of Oregon being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by William T. Patten and particularly described in the annexed notification to the Surveyor General of Oregon; that he is personally acquainted with said Wm. T. Patten and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 15th day of November, 1850 to the 28th day of November, 1854.

FRANCES M. SMITH.

Subscribed and sworn before me this 28th day of Nov'*b* 1854, in Salem, O. T.

C. K. GARDNER,
Sur. Gen. of Oregon.

No. 44.

Jesse Dickens of Marion County, in the Territory of Oregon, being first duly sworn says that he is in *now* way interested in the tract or tracts of land claimed as a donation by William T. Patten, and particularly in the annexed notification to the Surveyor General of Oregon that he is personally acquainted with said Wm. T. Patten, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 15th day of November, 1850, to the 28 day of November 1854.

JESSE DICKENS.

Subscribed and sworn before me this 28 day of Nov'r 1854, in Salem, O. T.

C. K. GARDNER,
Sur. Gen. of Oregon.

Sheet No. 8.

Oregon.

Donation Certificate No. 269.

Notification No. 44.

Whereas, in conformity with the provisions of the 7th Section of the Act of Congress, approved September 27 1850, entitled
168 "An act to create the office of Surveyor General of the Public Lands of Oregon, and to provide for the survey, and to make donations to settlers of the Public Lands," and amendments thereto.

William T. Patten of the County of Marion, in the Territory of Oregon, claiming a Donation Right in virtue of the Acts aforesaid, to the following tract of public lands, known and designated in the surveys and plats of the United States as the "Claim No. 73," being parts of Sections 4, 5, 8, 9 & 10 in Township Eight South of Range one West, bounded as follows: Beginning at a point 15.14 chains South and 13.85 chs. west of the West corner of the South West qr. of Section 9, T. 8 S. R. 1 W.—thence North 2.14 chains; thence N. 63 degrees W. 3.76 chains; thence N. 16 degrees E. 88.47 chains; thence S. 89 deg. 42 min. E. 25.55 chains; thence South 51.00 chains; thence S. 89 deg. 30′ E. 26.37 chains; thence North 9.52 chains; thence S. 89 deg. 45′ E. 41.54 chains; thence S. 1 deg. W. 4.71 chains; thence South 43.75 chains; thence West 74.40 chains; thence North 1.40 chains; thence West 39.86 chains to the place of beginning, containing six hundred & forty two, nine-hundredths acres, (642.09).

The west half to Julia Ann Patten, wife of said William T. and the East half to William T. Patten,—having proven to the satisfaction of the Register and Receiver of the land office for "Willamette District," in Oregon Territory, the fact that such settlement was commenced on the Fifteenth day of November in the year one thousand eight hundred and fifty (1850) more than four years prior to the date hereof; and having pursuant to the requirements of the Acts aforesaid, established by two disinterested witnesses the fact of continued residence and cultivation, required by the 4th Section of said Act: Now therefore be it known, That we R. Wilcox, Register, and James Guthrie, Jr., Receiver of the Land Office aforesaid, do hereby certify to the Commissioner of the General Land Office the facts aforesaid, accompanied by the evidences thereof, in order that a patent may be issued to said claimants for the tract of land above described: Provided the said Commissioner shall find no valid objection thereto.

Given under our hands at the Land Office in Oregon City, this 28th day of June, 1855.

R. WILCOX, *Register.*
JAMES GUTHRIE, JR., *Receiver.*

169 Sheet No. 5.

No. 44.

Reuben Dickens of Marion County, in the Territory of Oregon, being first duly sworn, says that he is personally acquainted with William T. Patten, the person who claims a donation right to the tract or tracts of land described in notification No. 44, and Julia Anne Patten, his wife; and that he has known them to live together as man and wife from December, 1848, to 25th February, 1852; and that they are and were reputed by their neighbors as such during said period.

REUBEN DICKENS.

Subscribed and sworn to before me this 25th day of February, 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

170 UNITED STATES LAND OFFICE,
PORTLAND, OREGON, *June* 19, 1906.

I, Algernon S. Dresser, Register of the United States Land Office at Portland, Oregon, do hereby certify that I have carefully compared the attached copy of Notification No. 44 of William T. Patten, the proofs of the same, and Certificate No. 269 issued thereon to said William T. Patten with the notification, proofs, and certificate on file in this land office, and that the attached copy is a full, true and correct copy of said Notification, proofs and Certificate on file herein and of the whole thereof.

ALGERNON S. DRESSER, *Register.*

171 454.

U. S. LAND OFFICE,
OREGON CITY, OREGON, *Sept.* 1*st*, 1879.

I, L. T. Barin, Register of the Land Office at Oregon City, Oregon, do hereby certify that the within copies of the Notification and proofs in Don. Claim of Geo. Riffe have been compared by me with the original proof, and that they are a correct transcript therefrom, and of the whole of such original Notification No. 454 and proofs in said claim.

L. T. BARIN, *Register.*

Sheet No. 2.

No. 454.

Notification.

To the Surveyor General of Oregon of settlement on Public Land in Township 8, S. R. 3, W.:

Pursuant to the act of congress approved on the 27th., day of September, 1850, entitled "an act to create the office of Surveyor

General of the Public Lands in Oregon, and to provide for the survey and to make donations to settlers of the public lands," I George Riffe of Marion Co., in the Territory of Oregon, hereby give notice of my claim to a donation of 320 A. of land, known and designates in the surveys and plats of the United States as a part of Sec. 5, 6, 7, & 8, in T. 8 S. R. 3 W.,bounded and described as follows: beginning at a point 1178 chains East of the S. W. corner of Sec. 5, T. 8 S. R. 3 W., running thence North 23.50 chains, thence West 40.00 chains, thence South 80.00 chains, thence East 40.00 chains, thence North 56.50 chains to the place of beginning, containing 320 As. as appears by the annexed diagram marked 454.

GEORGE RIFFE.

Oregon City, 27 May, 1852.

(In lead pencil is the following: "This land covered almost whol-y by the Donation Claim of Thies S. Jeffies Certificate 4861 and was evidently abandoned by Riffe.")

No. 454.

Affidavit of Settler.

George Riff of Marion County in the Territory of Oregon, being first duly sworn, says that he is a whit- settler on the public lands in Oregon, and was a resident thereof on and before the 1st., day of December eighteen hundred and fifty; and above the age of eighteen years on the 1st., day of December 1850, that he is a native born citizen of the United States, and that he was born in Casey County, Kentucky, in the year 1828; that he has personally resided upon and cultivated that part of the public land in Oregon particularly described in Notification number 454 hereto annexed continu-
172 ously from the 15th., day of December, 1851, to the 27 day of May, 1852.

—— ——.

Subscribed and sworn to before me in Oregon City, this 27 dau of May, 1852.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

Sheet 4.

Alexander R. Stoughton of Marion County, in the Territory of of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by George Riffe, and particularly described in Notification Number 454, hereto annexed; that he is personally acquainted with said George Riffe and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the 15 day of December, 1851, to the 27 day of May, 1852.

A. R. STOUGHTON.

Subscribed and sworn to before me this 27 day of May, 1852, in Oregon City.

JNO. B. PRESTON,
Sur. Gen. of Oregon.

No. 454.

John Stoughton of Marion County, in the Territory of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by George Riffe, and particularly described in Notification number 454, hereunto annexed; that he is personally acquainted with said George Riff, and knows that he has personally resided upon and cultivated said tract or tracts of lands, continuously, from the 15th., day of December, 1851, to the 27 day of May, 1852.

Subscribed and sworn to before me in Oregon City this 27 day of May, 1852.

JNO. B. PRESTON,
Sur. Gen'l of Oregon.

Sheet No. 5.

No. 454.

Oregon.

Form of Settler's Oath.

Claiming by virtue of settlement and cultivation commenced subsequent to December 1, 1850.

173 I, George Riffe of Marion Co. Org'n am a claimant of the public land described in the annexed Notification to the Surveyor General of public lands in Oregon, number 454, under the provisions of the act of Congress approved the 27th day of September, 1850, entitled "An act to create the office of Surveyor General of the Public Lands in Oregon, and to make donations to settlers of the said public lands;" and I do solemnly swear that I am not acting, directly or indirectly, as an agent for or in the employment of others in making such claim, but that the land so claimed by me is for my own use and cultivation, and that I have made no sale or transfer, or any arrangement or agreement for any sale, transfer, or alienation of the same, or by which the said land shall inure to the benefit of any other person.

GEORGE RIFFE.

Subscribed and sworn to before me in Oregon City this 27 day of May, 1852.

JNO. B. PRESTON,
Surveyor General of Public Lands in Or'g'n.

Sixth Sheet.

UNITED STATES LAND OFFICE.
PORTLAND, OREGON, *June* 19, 1906.

I, Algernon S. Dresser, Register of the United States Land Office at Portland, Oregon, do hereby certify that I have carefully compared the attached copy of Notification, No. 454 of Geo. Riffe and proofs thereof with the Notification No. 454 and proofs on file in this office, and that said attached copy is a full, true and correct copy of said Notification No. 454 and proofs on file and of the whole thereof.

ALGERNON S. DRESSER, *Register.*

174 [Endorsed:] #3084. Superior Court for Thurston Co. Sylvester *et al. vs.* The State of Washington. Motion and Affidavit. Filed in Superior Court Thurston Co., Wash., Sep. 11, 1906. B. T. Baker, clerk. G. M. Savage and M. L. Sylvester, Att'ys for Pl'ffs.

175 In the Superior Court of the State of Washington for Thurston County.

No. —.

April 26, 1906.

CLARA E. SYLVESTER ET AL., Plaintiffs,
v.
THE STATE OF WASHINGTON, Substituted as Defendant for A. B. Allison *et ux.*, Defendant.

Oral Decision.

ALBERTSON, *Superior Judge:*

After careful consideration of the briefs in this case, I have reached a conclusion which I will announce at this time.

The action was brought by the plaintiffs against defendants Allison and wife. The State of Washington intervened, and asked to be substituted as a party defendant. Order of substitution was entered, and an answer filed by the state, to which the plaintiffs replied, and the case proceeded to trial as one solely against the state.

The decision of the case involves a construction of the act of Congress commonly known as the "Oregon Donation Act." The action is brought by the sole heirs at law of the donation claimant to whom the patent was issued by the United States government.

The contention of the plaintiffs is that at the time Sylvester, the donation claimant, and his wife, conveyed the property in dispute to the Territory of Washington, the law did not permit such a conveyance. It is contended that at that time he had no right to convey the property, and that his deed did not convey any title, even if there was a grantee capable of taking the title. The first question

raised in support of the contention of the plaintiffs is that at
176 the time the Territory of Washington was not capable of taking the title to land, and that consequently the deed could not divest the title to the grantor, and that the state could not succeed to the title unless the Territory had acquired it. It seems to me that the Territory of Washington, having been organized under an act of Congress as a government for the Territory had the inherent power to do what was necessary to be done in the exercise of the powers of the government. While I do not find any express power in the acts of Congress giving the Territory the right to acquire land, yet I think it was an inherent power of government that was given by that act of Congress. It seems to me, furthermore, that when the act of Congress appropriated a sum of money for the purchase of a capitol site for the Territory, it necessarily followed that Congress intended to give to the Territory the right to acquire a place for the construction of the capitol. The money appropriated by Congress was not for the purpose of purchasing land for the site, but for the construction of buildings, but unless the Territory could acquire a *locus* for the site of the building, the act of Congress would have been utterly inadequate. So I am constrained to hold that if Sylvester, the donation claimant, and subsequent patentee, at the time of his conveyance,—at the time of his deed to the Territory of Washington, had such a title as he could convey that the Territory succeeded to his title.

Under the original donation act, or perhaps an early amendment, the date of which I do not recall at this moment, a settler upon land as a donation claim was, by implication at least, prohibited from making any conveyance of land that would be operative until he had received a patent from the government. In the couse of legislation, however, an amendment of the original act was passed by Congress which permitted the donation claimant to make conveyance of the land covered by hi*m* claim in advance of the issuance of the patent, provided he had resided upon the land and lived upon it continuously for a period of four years in advance of his
177 conveyance. The record in this case shows that the patent issued to Sylvester was of a later date than the deed from Sylvester to the Territory. Sylvester took up the land while he was an unmarried man, at least the record does not show that the land was taken up which his wife would acquire under the claim. It seems to me that the decision of the Supreme Court of the State of Washington, in a case from Whatcom County,—what is the name of that case, Mr. Falknor?

Mr. FALKNOR: Brazee *v.* Schofield.

The COURT: I am not sure whether that is the particular case to which I refer. The Supreme Court of this state has held that the title of the settler under the Oregon Donation Act vested in him so that he could make a conveyance of land upon the completion of the settlement and residence of four years. The final proof of the settler from the record on the government files recites and finds as a fact that Sylvester had settled upon and resided upon this land for at least four years prior to the date of his deed to the Territory.

The contention is urged that in no event could the state defend this action, because the legal title would not be in Sylvester until after the issue of the patent by the government. But if he had such an equity in the land at the time of his conveyance to the Territory as would entitle him to a patent, his equity passed to his grantee, the Territory. Under the practice of this state, as provided by the code, every defendant may set up either a legal or equitable title, so if any title passed at all under the conveyance from Sylvester to the Territory, the state succeeded to the title, and still has it unless the right of the state has been defeated by subsequent proceedings.

There was an act of Congress requiring the settler upon un-
178 surveyed land,—and I believe the record in this case shows that the land in question was unsurveyed for some time after Sylvester had settled upon it,—an act of Congress was passed some time in the 50's, requiring the settler upon unsurveyed land, who wished to acquire the title under the Oregon Donation Act, to notify the Surveyor General, I believe, of the Territory, of his intention to apply for the land, and of his residence upon it, for the purpose of acquiring the title, and under the law when such a notification was made, and the residence was continued for a period necessary to acquire title, the time the settler had lived upon the land in advance of his notification of intention to acquire it was included as a part of his residence of four years. I do not recall at this moment whether the record shows affirmatively the date of the notification that Sylvester gave of his intention to acquire this land under the Donation Act, but it is manifest that his right to the land was not forfeited by Congress by reason of any failure to make a seasonable notification, inasmuch as it appears that the government afterwards did issue to him a patent, and the patent would not have issued unless he had complied with the law in that respect. Furthermore, there is an act of Congress, passed in the early 60's, which in terms declares that the failure of the settler to make notification in the time required by the statute would not forfeit his title. I do not recall the date of the act, but there is such an act of Congress.

The record shows that the deed, which was a bargain and sale deed from Sylvester to the Territory, was recorded a year or more after the date of the deed. The court must find that owing to the length of time which has elapsed, and the unquestioned right of the Territory to occupy the land at least there was a delivery of this deed.

179 Proceedings were had in several of the early legislative sessions of the Territory with reference to acquiring of a site for the construction of the capitol building for which Congress had made an appropriation, and the record shows that this land was acquired under the authority of the territorial legislation. It is contended that under the deed, even if the grantor had a right to pass the title at the time, the Territory acquired simply a conditional title, that the land was conveyed for a specific purpose and a particular use, viz., as a site for the capitol building to be constructed, and for the use and benefit of the Territory while the land was occupied as a capitol site. The plaintiffs sought to introduce the evi-

dence of the widow of Mr. Sylvester, to show what was the intent of the parties in that regard. I believe that at the trial I excluded that part of the deposition of Mrs. Sylvester, but whether it was excluded or not, I feel constrained to disregard her testimony in that respect. There is no evidence that there was any such intent on the part of the state or the representatives of the state. Sylvester, the owner of the land, who took it as his donation claim, has been long since dead, and of course could not speak as to his intent in that regard, but the deed has stood unchallenged and unimpeached since it was executed and delivered. There has never been a proceeding in court for the reformation of the deed to conform to the mutual intent of the parties, if there was any intent other than that expressed. The introduction of the deed in evidence in the absence of a proceeding to reform the instrument, makes the contents of the deed itself the evidence of the character of the grant. The testimony shows that in the year '55,—when was that date?

Mr. FALKNOR: '55.

The COURT: The Territory took possession and constructed
180 a building for capitol purposes, and occupied the land openly, notoriously and continuously until the admission of the Territory as a state into the Union, under the Enabling Act, and the state of Washington succeeded to all of the rights and properties of the Territory of Washington, and the state of Washington has whatever title the Territory acquired. The legislature of the state of Washington, in the early '90 or '92, after the admission of the state, passed an appropriation for the construction of the new capitol building in the main upon the land involved in this litigation and partly upon two acres that were contiguous, to which the state has at this time an undoubted and unchallenged title. It would seem that the Governor of the State,—Gov. McGraw—before approving the bill or permitting the expenditure of the money appropriated for the construction of the capitol, referred the matter of the title to the Attorney General of the State, Mr. Haight being the Acting Attorney General, living at Olympia, and who took charge of the matter at the request of the Governor. There is an opinion on file in the case, and which the Supreme Court may consider if it is any evidence. There is a lengthy opinion by the Attorney General as to the title of the state to this land, and his conclusion was that the state, if it did not have the legal title, upon which he did not express an absolute opinion, that it at least had the equitable title to the land, and as a matter of precaution it seems that he arranged that a quitclaim deed be procured from the heirs of the Sylvesters. Such a quitclaim deed was secured, and there is a provision in it that in case the State should cease to occupy this land for use as a capitol site all of the right of the state acquired under the quitclaim should be determined and expire. If the state at the time of this quitclaim had a title to this land, there would seem to be no consideration for such a provision in the quitclaim deed that was secured, but measured by the terms of the provision set forth in the quitclaim all that the grantors in the quitclaim deed could exact in case the capitol
181 site should be abandoned by the state would be the nullification of the quitclaim, that is the plain and express language

of the instrument. It is not provided in the quitclaim, even if the Attorney General had any power to bind the state to a qualification of that character, which I very much doubt, it is not provided that upon the abandonment of the ground by the state for a capitol site the title originally acquired by the state under the Sylvester's deed should revert to the grantors of the quitclaim. The right of the state would remain in case of abandonment then as it was before the quitclaim was executed and delivered.

It would seem that after the quitclaim was taken and the appropriation for the construction of the building was partly expended, the state became unable to negotiate sufficient money on the bonds for the completion of the building, and that at the present time there is only a foundation on a part of this ground. A subsequent legislature of the state enacted a law providing for the purchase of such grounds in the City of Olympia as are known as the County Courthouse premises, and the Sylvester Park, for the use of the state as capitol grounds. In the course of time the title to these new premises was acquired by the state, and new buildings and annexes were constructed upon this land for the use of the state legislature when it was in session, and for the offices of the State's officers, residing at Olympia, and from the time of the purchase and construction of these new buildings the premises have been occupied by the state as Capitol Grounds. The sessions of the legislature have since been held in this building, and the state has its offices there, and all of the officers of the state that can be accom-dated in that headquarters maintain their offices in this building on that new ground.

While it is not necessary for me in view of the conclusion I have reached, to state what I would hold under other circumstances, yet it is an issue in this case, and I am called upon to decide, 182–191 and I would hold that if the original deed of the Sylvesters to the Territory contained the provision, that is, the provision as to reversion of title, such as is contained in the Sylvester heirs deed to the state, that under the evidence there has been such an abandonment of the land for capitol purposes as would cause the title to revert. But there is no such provision in the original deed, and the title of the state is founded upon that deed, and I am constrained to hold that it has a good title.

Regardless of the question as to other improvements on the land, the state in its answer set up the construction of improvements, and asked that the value of these improvements be offset against any judgment that plaintiffs might recover, but the act of the legislature under which this plea is raised has been declared by the Supreme Court of the state to be not retroactive, and would not apply to the facts in this case, and if the plaintiffs should recover at all they would recover the land and the buildings upon it, although the plaintiffs have offered in open court, and probably the- could — would have authority to allow the state a period of twelve months, was it?— within which to remove the buildings, if the state desired.

In view of the conclusion of the court as to all of the facts in the case, the judgment of the court in this case must be for the state and against the plaintiffs.

[Endorsed:] # 3084. Sylvester *et al. vs.* State of Wash. Oral opinion. Filed in Superior Court, Thurston Co., Wash., May 2, 1906. B. T. Baker, Clerk.

* * * * * * *

192 No. 6643.

Mrs. Clara E. Sylvester and May L. Sylvester, Appellants,
vs.
The State of Washington (Substituted as Defendant for A. B. Allison *et ux.*, Defendants), Respondent.

Filed July 15, 1907.

The appellants brought this action against the State of Washington to recover a tract of land, containing some ten acres, held by the state as a part of its capitol grounds. The appellant Clara E. Sylvester is the wife, and the appellant May L. Sylvester is the daughter of Edmund Sylvester, deceased, and together they constitute his sole heirs at law. The land in question is a part of a larger tract patented by the government of the United States to Edmund Sylvester. The appellants claim the land as his heirs at law, contending that the muniments of title through which the state holds the property are either void and of no effect, or are subject to conditions which have been forfeited by the state.

Edmund Sylvester acquired title to the land under the act of Congress of September 27, 1850, commonly known as the Oregon Donation Act, 9 U. S. Stat. at Large, 496. The record shows that he made settlement upon it in 1850, filed his notification of such settlement with the surveyor general of Oregon in February, 1854, made final proof of his settlement and continuous residence on July, 1858, and received patent for the land in May, 1860.

On March 2, 1853, Congress passed an act creating the territory of Washington. The act specifically described the boundaries of the new territory, and provided for it a complete scheme of internal government. As a part of the governing body it created a legislative assembly, and gave it power at its first session, or as soon
193 thereafter as it should deem expedient "to locate and establish the seat of government for said territory, at such place as [it might] deem eligible; which place, however, shall thereafter be subject to be changed by said legislative assembly;" and the sum of five thousand dollars was appropriated out of the general treasury "and granted to said territory of Washington to be there applied by the governor to the erection of suitable buildings at the seat of government." 10 U. S. Stat. at Large, 172, *et seq.* The legislative assembly exercised the power thus granted at its second session. On January 9, 1855, it passed the following act: (Laws 1854-5, p. 5.)

"Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That the seat of Government of this Territory be, and hereby is established and located on a certain piece or parcel of land on the land claim of Edmund Sylvester, in the county of

Thurston, in section twenty-three, township eighteen north, range two west, containing ten acres, and more particularly described as follows: Commencing at a point south twenty-four degrees, twenty-three minutes west, nineteen, and two one-hundredths chains from the north-west corner of Main and Union Streets, in the town of Olympia; thence south seven and fifty one-hundredths chains; thence west eight and fifty-eight hundredths chains; thence north, forty-seven degrees west, one and seventy-three hundredths chains; thence north, forty-eight degrees thirty minutes west, one and sixty hundredths chains; thence north, sixty-five degrees west, one and ninety-three hundredths chains; thence north, thirty-three degrees thirty minutes west, two and eighty hundredths chains; thence north, thirty-eight degrees west, one and seventeen hundredths chains; thence north, forty-five degrees west, one and eighty-seven hundredths chains; thence east sixteen and four hundredths chains, to place of beginning.

SEC. 2. This act to take effect and be in force fifteen days after its passage; Provided, That within that time the present owners or claimants give a deed of release for the above described ten acres of land to the territory of Washington without expense to said territory, which shall be deemed satisfactory by a joint committee to be appointed by both branches of the legislative Assembly to examine and receive the same.

Passed January 9, 1855."

On January 18, 1855, nine days later, Edmund Sylvester and his wife Clara E. conveyed to the territory of Washington the lands in the act described; and on January 29, 1855, the Territory by a special act accepted the deed, authorized it to be deposited in the office of the secretary of the territory, and directed that the governor take possession of the tract described and "hold possession thereof, for the use and behalf of the Territory of Washington, in accordance with the first section of the act and to which this is a supple-
194 ment." Possession of the tract was thereupon taken, which possession has been maintained by the Territory and its successor the state of Washington from thence until the present time.

The deed from Edmund Sylvester and wife to the Territory was in form a deed of bargain and sale, the granting words being, "do grant, bargain, sell, convey and confirm unto the said" territory &c. The habendum clause was as follows: "To have and to hold the same to the said party of the second part forever, free from any claim of the said party of first part, their heirs or assigns, or any or all persons claiming by, through, from, or under them or any of them." It was executed, as will be observed from the dates given, more than four years after Sylvester had made settlement upon the land, and more than a year after he had given notice to the Surveyor General of Oregon of his intent to claim the same under the Oregon Donation act, but was executed prior to the time he had made final proof of his settlement and cultivation, and prior to the time patent was issued to him therefor by the United States.

After the admission of the Territory of Washington into the Union as a state, the legislature passed an act for the location of a

capitol building on the land in question. At that time the then attorney general examined into the title of the state to the land and advised that a deed be procured from the heirs of Edmund Sylvester in order to perfect the state's legal title. Pursuant to this opinion, after request made of them, the present appellants executed to the state a quit claim deed to the land, reciting, however, that the deed was made and accepted on the express condition that the tract should be and remain the site for the capitol of the state of Washington, and that in the event of a breach of the foregoing condition, or in the event of the location of the capitol elsewhere than upon such tract, the deed should become null and void. The state, however, did not erect a capitol building upon this *sight*. After spending some sixty odd thousands of dollars in the erection of a foundation for such a building, it abandoned the project, and erected a capitol
195 building in another part of the city of Olympia, wherein all the state officers are now situate. But the state still maintains possession of the ten acre tract, making biennial appropriations through the legislature for its care and preservation.

The foregoing facts are in the main undisputed. The appellants, however, make some question as to the time the notification to the surveyor general by Edmund Sylvester of his intent to claim the land was filed. They show that a survey of the land claim was made as late as April 22, 1857, and argue that inasmuch as the notification could not have been given until after the survey, it must have been given at a date later than the date found by the court. This contention is further supported by certificates from the surveyor general of Oregon and the register of the land office at Oregon City, Oregon, to the effect that neither office contains any record of the filing of such a notification. But the state produced a certified copy of the notification from the General Land Office at Washington. This paper bears on its face evidence of its genuineness, and shows conclusively that it was given at the date first above stated. It shows, moreover, that the claim had actually been surveyed prior to that time as it contains a description of it by metes and bounds corresponding in detail to the description given of the claim in the patent. The fact that this paper was not found in the offices where it would be expected to be found does not detract from its character as evidence. The explanation is perhaps to be found in the fact that the territory of Washington was cut off from the Oregon territory between the time of the giving of the notification and the issuance of the patent, and the confusion arose in making the necessary transcription from the records incident to the creation of a new territory out of an old one. But be this as it may there was no law requiring that this record be kept in the Oregon land offices, and the General Land office at Washington, for its better preservation, might well take possession of it and maintain it as a part of its own files.
196 We conclude therefore that the facts are correctly found.

The question remaining is did the court err in its conclusion of law to the effect that the state had title in fee to the land in suit. In discussing this question we will notice the several contentions of the appellants in the order in which they present them.

The first is that the original deed from Edmund Sylvester and wife to the Territory of Washington was void for want of a grantee empowered to take title. The argument is that the territory, not being sovereign, had no inherent power to take title to land, and that such a power was not conferred upon it by congress in the act creating the territory. But without inquiring into the sovereign capacity of the territory to take and hold real property, and conceding that no express authority was conferred on the territory by the organic act, we still think that it had power to acquire and hold land for the purposes of a capitol site. From the questions heretofore made from the organic act it will be observed that the congress especially empowered the legislative assembly of the territory to locate and establish the seat of government for the territory, and made an appropriation for the erection of suitable buildings on the site so selected. The power to locate and establish the seat of government and erect suitable buildings thereon, must have necessarily included the power to acquire and hold such a quantity of land as was required for that purpose. To hold otherwise would be to deny the territory power to carry out the powers expressly conferred, as it is manifest that it could not establish a seat of government and erect suitable buildings for its purposes without acquiring a site upon which to establish the seat of government or erect the buildings. The appellants suggest that the legislative assembly might have acquired by lease sufficient land for its purposes. But this instead of being an argument against the existence of the power to acquire title to the land is a concession in its favor, as it would require no greater act of sovereignty for the territory to acquire property for capitol purposes by a deed in fee than it would to acquire the same
197 property by a lease for a definite or indefinite time.

The fact that the congress at a subsequent session made another appropriation for the erection of a "temporary capitol, and for a penitentiary, inclusive of the sites of the buildings," does not require the holding that no authority to acquire title to land was included in the previous grant of power. The latter act is in no way connected with the earlier one, and certainly does not preclude us from applying to the earlier one the ordinary rules of construction.

The second contention is that the deed, since it did not run to the successors or heirs of the territory, conveyed to it an estate terminable at the end of its existence, and that in consequence the property reverted to the heirs at law of Edmund Sylvester when the territory was merged into the state. But the common law rule that the word heirs, or its equivalent, was necessary in a deed in order to convey a fee had no application when the grant was to the crown, while the individual representing the sovereignty might change the sovereign itself was immortal by perpetual succession; and on principle, a life estate to an ideal being having a perpetual and uninterrupted existence must be coextensive with a fee or perpetuity, and hence words of succession cannot extend it. For similar reasons the same result followed deeds at common law to corporations aggregate.

Jones on Real Property, Sec. 598;
Wilcox *v.* Wheeler, 47 N. H. 488;
Asheville Division No. 15 *v.* Aston, 92 N. C. 578.

So on similar principles a deed to the Territory did not require the words of succession in order to pass a fee. The deed while in form to the territory was in fact to the government, and while the form of government changed in the change from a territory to statehood there was no lapse in the government itself. The government has had an uninterrupted existence.

The third contention is that the deed is void because prohibited by the donation act itself. As originally enacted the proviso to the fourth section of the act did provide that all contracts by any person for the sale of the land which such person might be entitled
198 to under the act before he received patent should be void: (9 U. S. Stat. at Large, 497, sec. 4,) but by the amendatory act of July 17, 1854, 10 U. S. Stat. at Large, 305, Sec. 2, it was further enacted, "That the proviso to the fourth section of the act of twenty-seventh September, eighteen hundred and fifty, above mentioned, by which all contracts for the sale of lands claimed under that law, before the issue of patents therefor, are declared void, shall be and the same is hereby, repealed: Provided, That no sale shall be deemed valid, unless the vendor shall have resided four years upon the land." This act has been held by this court, as well as by the Supreme Court of the United States, to permit a donation land claimant after four years' residence and cultivation to sell and convey his claim, whether he had received patent therefor or not.

Roeder *v.* Fouts, 5 Wash. 135;
Brazee *v.* Schofield, 2 Wash. Ter. 209;
Brazee *v.* Schofield, 124 U. S. 495;
Barney *v.* Dolph, 97 U. S. 652.

The deed in question here was executed after Edmund Sylvester had completed a four years' residence upon the claim. As shown by his own affidavits and the affidavits of his witness on which patent was issued, he commenced his residence on the land sometime in 1850, and resided upon it continuously until he made the deed to the territory, on January 18, 1855, a period of over four years. His deed, therefore, was not void for want of title in himself, nor did it violate any rule of public policy.

The appellant cites Vance *v.* Burbank, 101 U. S. 514, as overruling the earlier case of Barney *v.* Dolph, *supra*, but a more careful examination of the case will show that this is not so. The earlier Oregon cases, and some cases in the inferior federal courts, had laid down the rule that the donation act was a grant *in presenti*, the donor taking a present title subject to be defeated by conditions subsequent, and Barney *v.* Dolph was thought to affirm that principle. The case cited merely holds that this was not a correct construction of
199 the act, and that it was not intended in Barney *v.* Dolph to so hold. It held that the grant did not take effect until the settler had resided upon and cultivated the tract for four consecutive years, and otherwise conformed to the provisions of the act, but did not depart from the rule that the settler had power to convey the

fee after having resided upon the land and cultivated the same for four consecutive years.

The fourth contention is that the trial court erred in excluding parol evidence tending to show that the first deed was executed upon the condition that the Territory would erect and maintain a capitol building upon the land conveyed. But manifestly there was no error in this. No rule of law is more uniformly applied than is the rule that a parol contemporaneous agreement cannot be shown to vary the terms of a written instrument. This rule is applicable here as a deed is such an agreement as falls within the rule. Devlin on Deeds, Sec. 850*a*, 2nd. Ed.

The fifth contention is that the second deed, the deed made by the present appellants to the state, governs and determines the status of the parties and the tenure by which the state holds the land in question. Much of the argument under this branch of the case is based on the assumption that the first deed was invalid and insufficient to convey the title of the property to the state; but since we hold the deed to be valid and sufficient for that purpose, we need not follow the appellants into this branch of their argument. They argue further, however, that the state having sought for and obtained the second deed is now estopped from asserting that it holds the land under a different tenure than that expressed in such deed. But we cannot think the conclusion necessarily follows from the conduct of the state. Doubtless the appellants could have made it a condition on giving the second deed, if the state would have consented, that the land should revert to them in case the state should cease to use it as a capitol site, but they did not do this. The remedy reserved for a breach of the condition was that the deed itself should
200 be void,—that is to say, the state by failing to perform the conditions, could claim nothing by virtue of the deed, but it was not provided that it must surrender all the rights it had acquired by virtue of the earlier instrument by a failure to keep these conditions; and to be enforced it must have been so expressly provided, as no such condition could be implied.

The sixth is that the original deed is void for want of a sufficient description of the property conveyed. The deed followed the description contained in the act locating the seat of government above quoted, with the exception that it omitted the phrase "town of Olympia" following the words "Main and Union streets." But the omission did not render the description void. Enough remained to accurately locate the land conveyed, and this is all that is necessary to constitute a sufficient description.

Lastly the appellants object to the sufficiency of the answer filed on behalf of the state, contending that it contains an admission that the state holds the land in question subject to forfeiture in case it ceases to use it for a capitol site. We do not so read the answer, but if it required that construction it would not alter the appellants' position. The case was tried in the court below as if upon sufficient pleadings, and we must consider it upon the same theory in this court. To do otherwise would be to deny to the respondent the benefit of the statutes relating to amendments.

As we find no error in the record the judgment will stand affirmed.

FULLERTON, *J.*

We concur:
HADLEY, *C. J.*
MOUNT, *J.*
CROW, *J.*

200½ I dissent. I think Mrs. Sylvester should have been permitted to give testimony as to what the real consideration was for the grant which she and her husband made to the Territory of Washington. It is almost, if not entirely, a justificable inference from the statutes and deed that this grant was made upon the understanding that this land was to be used as the permanent site of the capitol for the territory and succeeding state. Her testimony was offered to fully establish this. I think it should have been received. The patriotism and beneficence manifested by Mr. and Mrs. Sylvester toward this commonwealth in its early infancy should not be repaid by a rigorous application of technical rules at this time. If, as I believe, they conveyed this land for the sole purpose of its being, and with the understanding with the territorial authorities that it should be, the permanent site of the capitol of the territory and state, I think that good faith and fair dealing require that the land should now revert, inasmuch as it has ceased to be used for the purpose for which it was thus granted.

ROOT, *J.*

201 In the Supreme Court of the State of Washington.

MONDAY, *September* 9, 1907.

No. 6643.

CLARA E. SYLVESTER ET AL., Appellants,
vs.
THE STATE OF WASHINGTON, Respondent.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Thurston county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on this 9th day of Sept. A. D. 1907, on motion of John D. Atkinson, Esquire, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, the petition for rehearing denied, and that the said State of Washington have and recover of and from the said Clara E. Sylvester and May E. Sylvester and from the Metropolitan Surety Co., surety, the costs of this action taxed and allowed at Sixty-five & 50/100 Dol-

lars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

202 In the Supreme Court of the State of Washington.

No. 6643.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Pl'tiffs in Error,
vs.
THE STATE OF WASHINGTON (Substituted as Defendant for A. B. Allison and Wife, Defendants), Def'd't in Error.

Petition for Writ of Error.

Come now the above named plaintiffs in error and complain that in the record, proceedings and final judgment of this court heretofore entered, manifest errors hath happened, to their great damage, a full statement of which is made in the assignment of errors filed herewith, and by reference made a part hereof, and petition this honorable court, being the highest court of said state, for the allowance to them of a writ of error to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, for the correction of said errors, and a reversal of the said judgment, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States, and for such other orders and process as may cause the same to be corrected by said court, and that this court fix the amount of security for costs which the said plaintiffs in error shall give upon said writ of error.

GEORGE MARVIN SAVAGE,
Attorney & Solicitor for Plaintiff- in Error, and
MAY SYLVESTER,
Of Counsel for Pl'tiffs in Error.

Indorsed: No. 6643. Petition for Writ. Filed Oct. 28 1907. C. S. Reinhart, Clerk.

203 In the Supreme Court of the State of Washington.

No. 6643.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Pl'tiffs in Error,
vs.
THE STATE OF WASHINGTON (Substituted as Defendant for A. B. Allison and Wife, Defendants), Def'd- in Error.

Assignment of Errors.

The petitioners and plaintiffs in error, in connection with their petition for writ of error, assign the following as manifest errors of

law occurring in the record, trial, final judgment and proceedings herein, to-wit:

1.

The court erred in deciding that the deed of Edmund Sylvester and wife, of date January 18th, 1855, conveyed the absolute, legal title, in fee simple, to the land in litigation. (Transcript, p. —.)

2.

The court erred in not deciding that the legal title to the land involved herein passed from the United States to said Edmund Sylvester by letters patent dated May 3rd, 1860. (Transc., p. —.)

3.

The court erred in deciding that the Territory of Washington had power to acquire the legal title to land to hold the same without authorization or direction by act of Congress, and in holding that it was authorized or directed to acquire such title to the land in suit. (Trans., p. —.)

4.

The court erred in deciding that the state of Washington succeeded to the title of the Territory of Washington under the deed of January 18th, 1855.

5.

The court erred in deciding that the deed of Edmund Sylvester and wife, of date January 18th, 1855, was not void.

204

6.

The court erred in deciding that the State of Washington is not estopped by the deed of these plaintiffs, dated March 21st, 1893. (Trans., p. —.)

7.

The court erred in not reading all the statutes, deeds, and writings together to show the intention and the condition, and in deciding that the second deed did not control.

8.

The court erred in deciding that plaintiffs motion for judgment on the pleadings and for lack of a sufficient legal answer, made at the opening, during the trial, and at the close of trial was properly denied. (Transc., p. —.)

9.

The court erred in striking out and refusing to consider all testimony of Mrs. Clara E. Sylvester, offered to show what was the consideration for the execution of the deed of January 18th, 1855, and the circumstances surrounding the transaction, and her understanding and intention in making said deed, and the terms of the parol agreement between herself and the officers of the territory contemporaneous and prior to the execution of the same, relative to the pur-

pose for which the land was deeded; and the court erred in striking out and refusing to admit and consider the deposition of Mrs. Clara E. Sylvester, on the ground that the testimony in said deposition contained was inadmissible in evidence, which deposition is in the words and figures following to-wit:

"STATE OF WASHINGTON,
County of King, ss:

Q. 1. Are you one of the plaintiffs in the suit of Clara E. Sylvester and May Sylvester against the State of Washington?

A. I am.

Q. 2. Did you some time in January, 1855, join with your husband Edmund Sylvester, now deceased, in signing a paper writing running to the territory of Washington, mentioned and re-
205 ferred to in the hereunto annexed answer of the defendant, State of Washington which has been served upon you in this action?

A. Yes, I presume I did.

Q. 3. What money consideration was received therefor?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. Nothing that I know of.

Q. 4. What was the real consideration or condition that induced you to sign the said paper writing?

Mr. BOOTH: Objected to on the ground that it is incompetent and immaterial and calling for testimony tending to vary the terms of a written contract.

A. Why that they should agree to have the capitol there, that it should be the capitol site, and if it was not used for that purpose it should come back to us.

Q. 5. Did you on March 21st, 1893 execute and deliver to the State of Washington a deed for the tract of land in dispute in this suit?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial.

A. Yes, I did.

Q. 6. Was any money consideration received by you for said deed?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. No.

Q. 7. What was the real consideration that induced you to execute said deed?

Mr. BOOTH: Objected to on the ground that it is incompetent,

irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. That it should continue to be used as a capitol and if not that it should revert back to the heirs.

CLARA E. SYLVESTER."

206 10.

The court erred in deciding that the obligations of the contract made between these plaintiffs and the State of Washington, on March 21st, 1893, have not been impaired, and their property taken for public use without due process of law and without compensation. (Transc., p. —.)

11.

The court erred in deciding that the title to the land conveyed by the deed of March 21st, 1893, did not reinvest in the grantors therein, these plaintiffs, upon breach of the condition therein and demand for possession. (Transc., p. —.)

12.

The court erred in holding that the notification of Edmund Sylvester, No. 44, was filed in Oregon. (Transc., p. —.)

13.

The court erred in holding that the description of the land in the notification and the patent were identical. (Transc., p. —.)

14.

The court erred in entering judgment for the land described in the second deed, dated March 21st, 1893. (Transc., p. —.)

15.

The court erred in refusing to allow the witness May L. Sylvester to answer the following question: "You may state the conversation you had with him touching the execution of the deed." (Statement. p. —.)

In order that the foregoing assignment and specification of errors may appear of record, the complainants present the same to this court, and pray that disposition may be made thereof in accordance with law and the statutes and constitution of the United States in such cases made and provided, and plaintiffs in error pray a reversal of the final judgment made and rendered against them herein.

GEORGE MARVIN SAVAGE,
Attorney for Pl'ffs in Error &
MAY SYLVESTER.

Indorsed: 6643. Assignment of Errors. Filed Oct. 28 1907. C. S. Reinhart, Clerk.

207 In the Supreme Court of the State of Washington.

No. 6643.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs in Error,

vs.

THE STATE OF WASHINGTON (Substituted as Defendant for A. B. Allison and Wife, Defendants), Defendant in Error.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard on motion of the above named plaintiffs in error, after consideration of the record and proceedings, and petition for allowance of writ of error, and the assignment of errors, it is ordered that a writ of error be and hereby is allowed plaintiffs in error, to have reviewed in the Supreme Court of the United States the judgment heretofore entered and all questions presented by the record herein, and that the amount of the bond on said writ of error be fixed at $500.00.

Dated this 28th day of October, 1907.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: No. 6643. Order allowing Writ. Filed Oct. 28, 1907. C. S. Reinhart, Clerk.

208 In the Supreme Court of the United States.

No. —.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs in Error,

vs.

THE STATE OF WASHINGTON (Substituted as Defendant for A. B. Allison and Wife, Defendants), Defendant in Error.

Bond for Costs.

Know all men by these presents: What we, Mrs. Clara E. Sylvester and May L. Sylvester, the plaintiffs in error above named, as principals, and the Metropolitan Surety Co., a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington as surety, are held and firmly bound unto the State of Washington, the defendant in error above named in the just and full sum of Five Hundred ($500.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of October, 1907.

Whereas, lately at a session of the Supreme Court of the State of Washington, in a suit pending in said court between Mrs. Clara E. Sylvester and May L. Sylvester, appellants *v.* The State of Washington, respondent, a final judgment was rendered against the said appellants, and they having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said defendant, The State of Washington;

Now, therefore, the condition of the above obligation is such that if the said Mrs. Clara E. Sylvester and May L. Sylvester shall prosecute their Writ of Error to effect and shall answer all lawful costs that may be awarded against said plaintiffs in error if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Mrs. CLARA E. SYLVESTER, [SEAL.]
By GEORGE MARVIN SAVAGE,
Her Attorney of Record. [SEAL.]

209 MAY L. SYLVESTER, [SEAL.]
By GEORGE MARVIN SAVAGE,
Her Attorney of Record. [SEAL.]

[Seal of the Metropolitan Surety Company.]

METROPOLITAN SURETY COMPANY, [SEAL.]
By H. B. HOYT, *Its Attorney in Fact.*
H. S. FRYE, *Its Attorney in Fact.*

The within and foregoing bond is approved as good and sufficient this 28th day of October 1907.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: No. 6643. Bond for Costs. Filed Oct. 28, 1907. C. S. Reinhart, Clerk.

210 In the Supreme Court of the State of Washington.

No. 6643.

Mrs. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs in Error,

vs.

THE STATE OF WASHINGTON (Substituted as Defendant for A. B. Allison and Wife, Defendants), Defendants in Error.

Judge's Certificate.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I hereby certify and declare that in the record and proceedings herein, and more especially in the complaint, reply and printed

and oral arguments made on behalf of the above named plaintiffs in error, there was drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision was against their validity; and the validity of a statute of, or an authority exercised under a state, on the ground of their being repugnant to the constitution or laws of the United States, and the decision was in favor of their validity; and the construction of a clause of the constitution or a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up and claimed; and wherein a right, title, privilege or immunity is claimed under the constitution or a statute of or authority exercised under the United States, and the judgment and decision was against the right, title, privilege, authority or immunity specially set up and claimed under said constitution, statute or authority;

And there was specially set up, claimed, pleaded, argued, considered and denied by this court a claim of right, title, privilege, or immunity arising under the Constitution and statutes of the United States, under and by virtue of the provisions of the act of Congress of September 27th 1850, entitled, "An act creating the office of Surveyor General of the Public Lands of Oregon, and to provide for the survey and to make donations to settlers of said lands" (9 Stat. 496) commonly known as the Oregon Donation Law;

211 And there was also specially set up, claimed, pleaded, argued, considered and decided by this court a claim of right, title, privilege or immunity arising under the constitution and statutes of the United States, under and by virtue of the provisions of the act of Congress of September 27th, 1850, entitled "An act to establish the Territorial Government of Washington" commonly known as the Organic Act of Washington and the decision of this court was adverse to the plaintiffs in error;

And there was also specially set up, claimed, pleaded, argued, considered and decided by this court the claim of plaintiffs in error that the obligations of a contract made with them by the State of Washington, of date March 21st, 1893, have been impaired, and their property taken for public use without due process of law and without compensation, contrary to the provisions of Amendments Five and Fourteen of the Constitution of the United States, and contrary to the provisions of Sections Three and sixteen of Art. 1 of the Constitution and Laws of the State of Washington and the decision was against the claims so set up as aforesaid;

Wherefore, a federal question has been properly and seasonably raised herein for your determination upon the appeal of this action to your court by plaintiffs in error.

Witness my hand this 28th day of October, 1907.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: No. 6643. Judge's Certificate. Filed Oct. 28, 1907. C. S. Reinhart, Clerk.

212 In the Supreme Court of the United States.

No. —.

Mrs. Clara E. Sylvester and May L. Sylvester, Plaintiffs in Error,

vs.

The State of Washington (Substituted as Defendant for A. B. Allison and Wife, Defendants), Defendant in Error.

Writ of Error.

United States of America, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the final judgment of a plea which is in the Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit, between Mrs. Clara E. Sylvester and May L. Sylvester, plaintiffs and appellants, and plaintiffs in error herein, and the State of Washington, defendant and respondent, and defendant in error herein, wherein was drawn in question the validity of a statute of, or an authority exercised under the United States, and the decision was against their validity; and the validity of a statute of, or an authority exercised under or by said state, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity; and the construction of a clause of the Constitution or a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up and claimed under the same; and wherein a right, title, privilege or immunity is claimed under the Constitution or a statute of the United States, or authority exercised under the United States, and the judgment was against said claim;

213 And there were specially set up, claimed, pleaded, argued, considered and denied by said Supreme Court of the State of Washington, a claim of right, title, privilege or immunity arising under the Constitution and statutes of the United States, under and by virtue of the provisions of the act of Congress of September 27th, 1850, entitled, "An act creating the office of Surveyor General of the Public Lands of Oregon, and to provide for the survey and to make donations to settlers of said lands" (9 Stat. 496) commonly known as the Oregon Donation Law;

And there was also specially set up, claimed, pleaded, argued, considered and decided by said Supreme Court of the State of Washington, a claim of right, title, privilege or immunity arising under the Constitution and Statutes of the United States, under and by

virtue of the provisions of the act of Congress of September 27th, 1850, entitled, "An act to establish the Territorial Government of Washington" commonly known as the Organic Act of Washington, and the decision of the Court was adverse to these plaintiffs in error;

And there was also specially set up, claimed, pleaded, argued, considered and decided by said Supreme Court of the State of Washington, the claim of plaintiffs in error that the obligations of a contract made with them by the State of Washington, of date March 21st, 1893, have been impaired, and their property taken for public use without due process of law and without compensation, contrary to the provisions of Amendments Five and Fourteen of the Constitution of the United States, and contrary to the provisions of Sections Three and Sixteen of Art. I. of the Constitution and Laws of the State of Washington, and the decision of the Court was against the claims so set up,

A manifest error hath happened, to the great damage of the said plaintiffs in error as by their pleadings and petition and the record appears.

214 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, within sixty days from the date of this writ, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of October, 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk U. S. Circuit Court, Western District of Washington.

The above Writ of Error allowed this 28th day of October, 1907.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

215 [Endorsed:] Original. No. 6643. In the Supreme Court of the United States. Clara E. Sylvester *et al.*, Pl'ffs in Er., *vs.* The State of Washington, Def'd't in Error. Writ of error. Filed Nov. 5, 1907. C. S. Reinhart, Clerk. Geo. Marvin Savage, Att'y for Plff's in Err., 454 N. Y. Bk., Seattle, & May Sylvester.

Due and legal service of the within Writ of Error accepted for the State of Washington this 5th day of November, 1907.

ALBERT E. MEAD,
Governor of the State of Washington.

Due and legal service of the within Writ of Error accepted for the State of Washington this 5th day of November, 1907.

JOHN D. ATKINSON,
Attorney General of the State of Washington.

216 In the Supreme Court of the United States.

No. 6643.

Mrs. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs in Error,
vs.
THE STATE OF WASHINGTON (Substituted as Defendant for A. B. Allison and Wife, Defendants), Defendant in Error.

Citation.

The President of the United States to the State of Washington, the above named defendant in error, and to Honorable Albert E. Mead, Governor of the State of Washington, and to John D. Atkinson, Attorney General of the State of Washington, and to A. J. Falknor, Assistant Attorney General, attorneys of record for said defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Washington, in that certain action wherein the above named Mrs. Clara E. Sylvester and May L. Sylvester are plaintiffs in error and the State of Washington is defendant in error, to show cause, if any there be, why the judgment against the said plaintiffs in error in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram E. Hadley, Chief Justice of the Supreme Court of the State of Washington this 28th day of October, 1907.

[SEAL.] HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

217 [Endorsed:] In the Supreme Court of the State of Washington. 6643. Clara E. Sylvester *et al.*, P'l'ffs in Error, *vs.* The State of Washington, Def'd't in Error. Citation. Filed Nov. 5, 1907. C. S. Reinhart, Clerk. Geo. Marvin Savage, Att'y for Pl'ffs in Error, 454 N. Y. Bk., Seattle, Wash.

Due and legal service accepted for the State of Washington this 5th day of November 1907.

JOHN D. ATKINSON,
Attorney General of the State of Washington.

Due and legal service accepted for the State of Washington this day of November 1907.

ALBERT E. MEAD,
Governor of Washington.

In the Supreme Court of the State of Washington.

No. 6643.

CLARA E. SYLVESTER, Plaintiff in Error,
vs.
THE STATE OF WASHINGTON, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed, between the attorneys for the respective parties herein that the clerk of the supreme court of the State of Washington may certify and send up to the Supreme Court of the United States as provided by law the original transcript, statement of facts and exhibits on file herein being all the transcript, statement of facts and exhibits before the supreme court of Washington upon which it rendered its opinion, and all the papers necessary to the appeal herein, and we hereby waive all objections to the sufficiency and form of said transcript, and agree that the same shall constitute the record on appeal.

JOHN D. ATKINSON, *Att'y Gen.*,
A. J. FALKNOR, *Ass't Att'y Gen.*,
Att'ys for D'f't State of Wash.
JOHN D. ATKINSON,
Attorney General of the State of Washington, Att'y for Defendant in Error.
GEORGE MARVIN SAVAGE,
Attorney & Solicitor for Plaintiffs in Error.

Indorsed: 6643. Filed Nov. 8, 1907. C. S. Reinhart, Clerk.

In the Supreme Court of the State of Washington.

No. 6643.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Pl'ffs in Error,
vs.
THE STATE OF WASHINGTON, (Substituted as Defendant for A. B. Allison and Wife, Defendants), Def'd't in Error.

Clerk's Certificate.

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify:

That the above and foregoing transcript, consisting of 219 pages,

inclusive, is a full, true, correct and complete transcript of the record statement and proceedings in the above entitled action, containing all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in the Supreme Court of the United States, including a copy of the opinions of the Court, and Judge's Certificate, and Exhibits .....
.....
.....
and that in pursuance of the Writ of Error heretofore filed in this cause I now transmit said transcript, together with the original Writ of Error & Citation, to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript and return to the Writ of Error is $8.70, which amount has been paid me by the plaintiffs in error.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this 11th day of December, 1907.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

[Endorsed:] Clerk's Cert.

220 In the Supreme Court of the United States.

Mrs. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs-in-Error,
v.
THE STATE OF WASHINGTON, Defendant-in-Error.

To the Clerk of the above named Court:

In conformity with the provisions of the ninth section of Rule Ten I hereto attach a statement of the errors upon which plaintiffs-in-error intend to rely, and designate as the parts of the record which plaintiffs-in-error think necessary for the consideration thereof and to be printed, the following:

The Complaint*if* of plaintiffs,

The Answer of defendant, the State of Washington,

The Reply of plaintiffs,

The Order allowing plaintiffs to amend Reply,

All the defendant's exhibits except deed dated January 18, 1855 (a copy of which is set out in Defendant's ans-er), and the map or blue print,

All of plaintiffs' exhibit except Patent to Donation Claim and deed bearing date of March 21st, 1893, made by plaintiffs (copies of which appear in plaintiffs' Reply) and photographs,

Affidavit of G. M. Savage and copies of Notification # 44 Oregon Land office and Notification # 43 Olympia Land Office, thereto attached,

Oral Decision of Albertson, trial judge,
Testimony of Albert E. Meade,
Testimony of Edmund Rice,
Opinion of Supreme Court of Washington,
Dissenting Opinion of Associate Justice Root
Petition for Writ of Error
Order allowing Writ of Error
Writ of Error
Assignment of Errors
Stipulation allowing original Transcript in Supreme Court to be sent up.

GEORGE MARVIN SAVAGE,
Attorney for Plaintiffs.

[Endorsed:] A copy of the within "Notice" and the thereto attached Assignment of Errors, received this 23rd day of January, 1908. John D. Atkinson, Attorney General of the State of Washington, A. J. Falknor, Ass't Att'y Gen., Att'ys for State of Wash.

221 In the Supreme Court of the State of Washington.

No. —.

Mrs. Clara E. Sylvester and May L. Sylvester, Appellants,
vs.
The State of Washington, Substituted as Defendant for A. B. Allison and Wife, Defendants, Respondent.

Assignment of Errors.

The petitioners and plaintiffs in error, in connection with their petition for Writ of Error, assign the following as manifest errors of law occurring in the record, trial, final judgment and proceedings herein, to-wit;

1.

The Court erred in deciding that the deed of Edmund Sylvester and wife, of date January 18th, 1855, conveyed the absolute, legal title, in fee simple, to the land in litigation. (Transcript, p. —.)

2.

The Court erred in not deciding that the legal title to the land involved herein passed from the United States to said Edmund Sylvester by letters patent dated May 3rd, 1860.

3.

The Court erred in deciding that the Territory of Washington had power under the Organic Act, or otherwise, to acquire the legal title to land and to hold the same without authorization or direction by

act of Congress, and in holding that it was authorized or directed to acquire such title to the land in suit. (Transcript, p. —.)

222 4.

The court erred in deciding that the State of Washington succeeded to the title of the Territory of Washington under the deed of January 18th, 1855.

5.

The court erred in deciding that the deed of Edmund Sylvester and wife, of date January 18th, 1855, was not void.

6.

The Court erred in deciding that the State of Washington is not estopped by the deed of these plaintiffs, dated March 21st, 1893. (Trans., p. —.)

7.

The court erred in not reading all the statutes, deeds, and writings together to show the intention and the condition, and in deciding that the second deed did not control.

8.

The court in deciding that plaintiffs' motion for judgment on the pleadings and for lack of a sufficient legal answer, made at the opening, during the trial, and at the close of trial was properly denied. (Transc., p. —.)

9.

The court erred in striking out and refusing to consider all testimony of Mrs. Clara E. Sylvester, offered to show what was the consideration for the execution of the deed of January 18th, 1855, and the circumstances surrounding the transaction, and her understanding and intention in making said deed, and the terms of the parol agreement between herself and the officers of the Territory contemporaneous and prior to the execution of the same, relative to the purpose for which the land was deeded; and the Court erred in striking out and refusing to admit and consider the deposition of Mrs. Clara E. Sylvester on the ground that the testimony on said deposition contained was inadmissable in evidence, which deposition is in the words and figures following to-wit:

223 "STATE OF WASHINGTON,
County of King, ss:

Q. 1. Are you one of the plaintiffs in the suit of Clara E. Sylvester and May Sylvester against the State of Washington?

A. I am.

Q. 2. Did you some time in January, 1855, join with your husband Edmund Sylvester, now deceased, in signing a paper writing running to the territory of Washington, mentioned and referred to in the hereunto annexed answer of the defendant, State of Washington which has *has* been served upon you in this action?

A. Yes, I presume I did.

Q. 3. What money consideration was received therefor?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. Nothing that I know of.

Q. 4. What was the real consideration or condition that induced you to sign the said paper writing?

Mr. BOOTH: Objected to on the ground that it is incompetent and immaterial and calling for testimony tending to vary the terms of a written contract.

A. Why that they should agree to have the capitol there, that it should be the capitol site, and if it was not used for that purpose it should come back to us.

Q. 5. Did you on March 21st, 1893, execute and deliver to the State of Washington a deed for the tract of land in dispute in this suit?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial.

A. Yes, I did.

Q. 6. Was any money consideration received by you for said deed?

Mr. BOOTH: Objected to on the ground that it is incompe-
224 tent, irrelevant, and immaterial and calling for testimony tending to vary the terms of a written contract.

A. No.

Q. 7. What was the real consideration that induced you to execute said deed?

Mr. BOOTH: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. That it should continue to be used as a capitol and if not that it should revert back to the heirs.

CLARA E. SYLVESTER."

10.

The court erred in deciding that the contract made between these plaintiffs and the State of Washington, on March 21st, 1893, have not been impaired, and their property taken for public use without due process of law and without compensation. (Transcript p. —.)

11.

The Court erred in deciding that the title to the land conveyed by the deed of March 21st, 1893, did not re-invest in the grantors therein, these plaintiffs, upon breach of the conditions therein and demand for possession. (Transcript p. —.)

12.

The Court erred in holding that the notification of Edmund Sylvester, No. 44, was filed in Oregon. (Transcript p. —.)

13.

The Court erred in holding that the description of the land in the notification and the patent were identical. (Transcript p. —.)

14.

The Court erred in entering judgment for the land de-
225 scribed in the second deed dated March 21st 1908.

15.

The Court erred in refusing to allow the witness May L. Sylvester to answer the following question: "You may state the conversation you had with him touching the execution of the deed."

226 [Endorsed:] 539, 20942. In the Supreme Court of the United States. Mrs. Clara E. Sylvester and May L. Sylvester, Plaintiffs-in-Error, *v.* The State of Washington, Defendant-in-Error. Notice to Clerk. George Marvin Savage, Attorney for Plaintiffs-in-Error.

227 [Endorsed:] File No. 20,942. Supreme Court U. S. October Term, 1907. Term No. 539. Clara E. Sylvester *et al.*, Pl'ffs in Error, *vs.* The State of Washington. Designation by Counsel for pl'ffs in error of parts of record to be printed & assignment of errors with proof of service of copies of same. Filed Feby 6th, 1908.

228 In the Supreme Court of the United States, October Term, 1907.

No. 539.

Mrs. Clara E. Sylvester and May L. Sylvester, Plaintiffs in Error,

vs.

The State of Washington, Defendant in Error.

In conformity with the provisions of the ninth section of Rule Ten, the Defendant in error hereby designates the parts of the record which it thinks material for printing, in addition to those designated by the plaintiffs in error, the following:

The map which is a part of Defendant's exhibits;
The testimony of Allen Weir;
" " " P. D. Moore;
" " " Millard Lemon;
" " " Wm. Ogle.

JOHN D. ATKINSON,
Attorney General,
E. C. MACDONALD,
Assistant Attorney General,
Attorneys for Defendant in Error.

229 [Endorsed:] 539, 20942, Mar. 9, '08. In the Supreme Court of the United States. Mrs. Clara E. Sylvester and May Sylvester, Plaintiffs in error, *vs.* The State of Washington, Defendant in error. Designation by defendant of additional parts of record for printing. John D. Atkinson, Attorney General, A. J. Falknor, Ass't Attorney General, Attorneys for Defendant in error.

230 [Endorsed:] File No. 20,942. Supreme Court U. S. October Term, 1907. Term No. 539.; Clara E. Sylvester *et al.*, Pl'ffs in Error, *vs.* The State of Washington. Designation by def't in error of additional parts of record to be printed. Filed March 9th, 1908.

Endorsed on cover: File No. 20,942. Washington supreme court. Term No. 227. Clara E. Sylvester and May L. Sylvester, plaintiffs in error, *vs.* The State of Washington. Filed December 20th, 1907. File No. 20,942.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

MRS. CLARA E. SYLVESTER and MAY L. SYLVESTER, Plaintiffs in Error,

vs.

THE STATE OF WASHINGTON, Defendant in Error.

Stipulation.

For the purpose of shortening the argument and advising the Court, without waiving other disputed facts it is stipulated that the record shows the following facts to be established.

1. That the instrument bearing date of January 18th, 1855, is the instrument signed by Edmund Sylvester and Clara E. Sylvester on that date.

2. That no money consideration was paid to the grantors of said deed for its execution and delivery.

3. That the sole and only consideration was that the "seat of government" of the Territory of Washington should be permanently located thereon.

4. That at the date of the execution and delivery of said deed Edmund Sylvester had not had the claim surveyed, had not made his final proof, had not filed his Notification, but had made proof of settlement.

5. That the Donation Claim of Edmund Sylvester was surveyed April 22, 1857, Notification # 44 was filed after January 29, 1858, at the Olympia Land Office, and Final Proof was made July 1st, 1858, and the fees paid on the same day; and that the Commissioner of the General Land Office accepted the final proof after October, 1858; and that patent issued May 3d, 1860.

6. That the deed of January 18th, 1855, was defective in that the initial point was not definitely located and that it did not express the real consideration.

7. That the deed of March 21, 1893, was given among other reasons for the purpose of curing the defects in the deed of January 18, 1855, and in said deed of March 21st, 1899, is the true and correct description of the land purported to be conveyed by the deed of January, 1855, and the true and only consideration for the deed of January, 1855.

8. That there was no court in which plaintiffs in error could sue until after the execution and delivery of the deed of March 21, 1893

9. That the Capitol is not now located on the land described in the deed of March 21, 1893, but is located more than a half mile from the land.

10. That this action was begun within three years from the removal of the capitol from the land described in the deed of March 21, 1893.

Dated Dec. 2nd, 1908.

GEORGE MARVIN SAVAGE,
Attorney for Plaintiffs in Error.
JOHN D. ATKINSON,
Attorney General of the State of Washington
and Attorney for Defendant in Error.

E. C. MACDONALD,
Of Counsel.

[Endorsed:] 227/20,942. No. —. In the Supreme Court of the State of Washington. Clara E. Sylvester and May L. Sylvester, Plaintiffs in Error, *vs.* The State of Washington, Defendant in Error. Stipulation. George Marvin Savage, 454 New York Block, Seattle, King Co., Washington.

[Endorsed:] File No. 20,942. Supreme Court U. S. October Term, 1908. Term No. 227. Clara E. Sylvester *et al.*, Pl'ffs in Error, *vs.* The State of Washington. Stipulation as to facts. Filed Jan'y 25th, 1909.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted] Term, 1908

No. [redacted] 40.

[redacted] SYLVESTER, *et al.*,
Plaintiffs in Error,

vs.

THE STATE OF WASHINGTON,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

[redacted] SAVAGE,
Attorney for Plaintiffs in Error.

[redacted] SYLVESTER,
Of Counsel.

454 M. F. BUILDING,
SEATTLE, WASH.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. _____

CLARA E. SYLVESTER, *et. al.*,
PLAINTIFFS IN ERROR,

vs

THE STATE OF WASHINGTON,
DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR.

GERGE MARVIN SAVAGE,
Attorney for Plaintiffs in Error.

MAY L. SYLVESTER,
in propria persona

454 N. Y. BLOCK,
SEATTLE, WASH.

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

NO._____

MRS. CLARA E. SYLVESTER AND
MAY L. SYLVESTER

PLAINTIFFS IN ERROR,

vs.

THE STATE OF WASHINGTON, DEFENDANT IN ERROR

STIPULATION.

The following stipulation was entered into too late to appear in the printed record:

For the purpose of shortening the argument and advising the court, without waiving other disputed facts, it is stipulated that the record shows the following facts to be established:

1. That the instrument bearing date of January 18, 1855, is the instrument signed by Edmund Sylvester and Clara E. Slyvester on that date.

2. That no money consideration was paid to the grantors of said deed for its execution and delivery.

3. That the sole and only consideration was that the "Seat of Government" of the Territory of Washington should be permanently located thereon.

4. That at the date of the execution and delivery of said deed Edmund Sylvester had not had the claim surveyed, had not made his final proof, had not filed his notification, but had made proof of settlement.

5. That the donation claim of Edmund Sylvester was surveyed April 22, 1857, Notification No. 44 was filed after Jan-

uary 29, 1858, at the Olympia Land Office, and final proof was made July 1, 1858, and the fees paid on the same day; and that the Commissioner of the General Land Office accepted the final proof after October, 1858, and that patent issued May 3, 1860.

6. That the deed of January 18, 1855, was defective in that the initial point was not definitely located and that it did not express the real consideration.

7. That the deed of March 21, 1893, was given, among other reasons, for the purpose of curing the defects in the deed of January 18, 1855, and in said deed of March, 1893, is the true and correct description of the land purported to be conveyed by the deed of January, 1855, and the true and only consideration for the deed of January, 1855.

8. That there was no court in which plaintiffs in error could sue until after the execution and delivery of the deed of March 21, 1893.

9. That the capitol is not now located on the land described in the deed of March 21, 1893, but is located more than a half mile from the land.

10. That this action was begun within three years from the removal of the capitol from the land described in the deed of March 21, 1893.

December 2, 1908.

GEORGE MARVIN SAVAGE,

Attorney for Plaintiffs in Error.

JOHN D. ATKINSON,

Attorney General of the State of Washington, and Attorney for Defendant in Error.

Statement of Case.

This is a writ or error to the Supreme Court of the State of Washington.

The plaintiffs in error sued to recover from the original defendants ten acres of land which they had donated to the State of Washington by deed dated March 21, 1893, upon the following conditions, subsequent:

"Provided, however, and this deed is made and accepted upon the express condition that said tract shall be and remain the site of the capitol of the State of Washington, and that in the event of a breach of the foregoing conditions, or in the event of a location of the capitol elsewhere than upon said tract, these presents shall be null and void." (Record, Original, p. 31; Printed, p. 19.)

These conditions having been broken by the State and the property having been abandoned by it for capitol purposes and placed in charge of the original defendants as tenants of the State, an action in ejectment was brought against them. On petition of the State, it was substituted as the defendant, and the case proceeded to trial, with plaintiffs in error as plaintiffs and the State as sole defendant.

The tract is a part of the donation land claim of Edmund Sylvester and was settled upon by Sylvester under the provisions of the act of Congress commonly known as the "Oregon Donation Law." Edmund Sylvester's donation claim was taken under Notification No. 44, Olympia Land Office, and numbered 73, Olympia Land Office. It was surveyed April 22, 1857 (Record, Original, p. 104; Printed, p. 58, and paragraph No. 5, Stipulation, supra). Final proof was made July 1, 1858, and Certificate No. 73 issued on the same day (Record, Original, p. 145; Printed, pp. 81-85, and Stipulation, supra). Patent issued May 3, 1860 (Record, page 79½, and Stipulation, supra). The state courts decided that there had been a breach of the conditions above set out and that the State of Washington had located and was occupying its capitol elsewhere than on said tract (Rec-

ord, Original, pp. 190, 191 and 195; Printed, pp. 103 and 106, and paragraph No. 9, Stipulation, supra), but that the title to the land did not revert to plaintiffs for the reason that the legal title in fee simple to the tract in controversy had passed to the Territory of Washington by deed from Edmund Sylvester and Clara E. Sylvester, his wife, bearing date of January 18, 1855 (more than *two years* before the donation claim had been surveyed and more than *three years* before final proof had been made, and more than *five years* before patent had been issued), to which title the State succeeded, without condition annexed thereto.

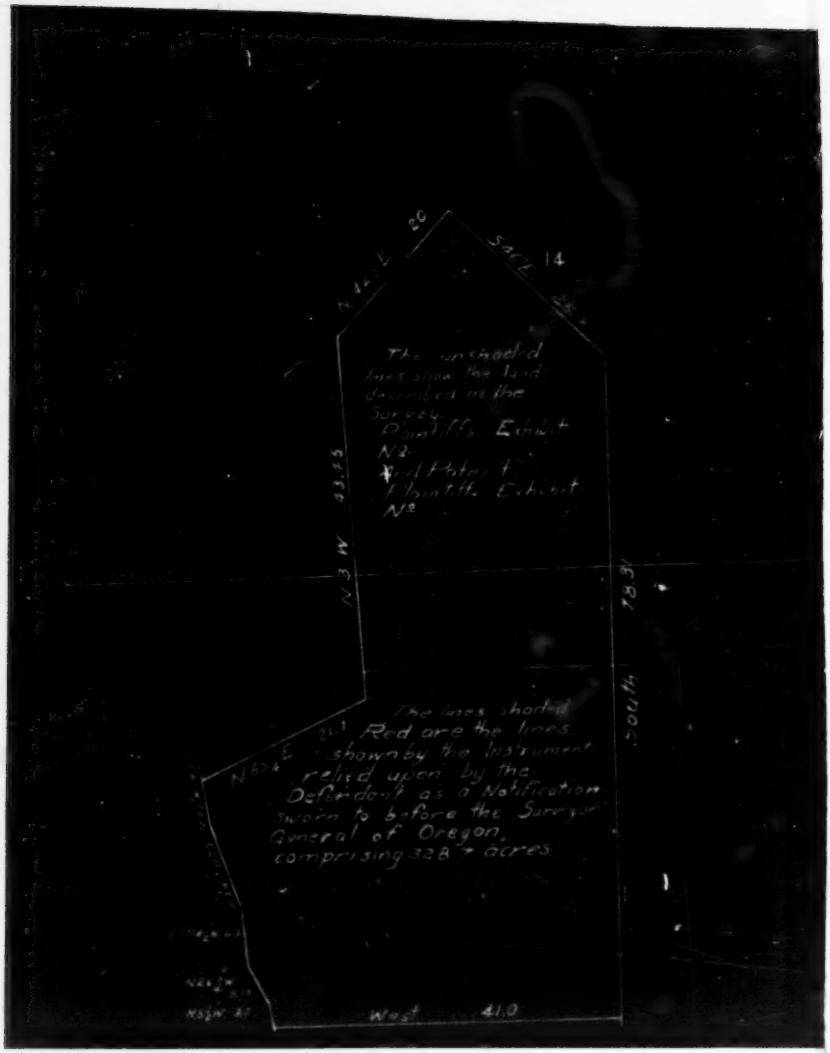
Edmund Sylvester died in 1887, leaving these plaintiffs as his sole heirs and without having made any conveyance of the land in controversy after final proof or any conveyance at all except the instrument dated January 18, 1855.

The trial court found that there was no evidence as to when Sylvester filed his notification, but the Supreme Court of the State of Washington held that he had filed it in Oregon prior to the deed of January 18, 1855. This holding of the Supreme Court of the State of Washington is directly opposed to the facts as proven at the trial (Record, Original, pp. 109 to 115; Printed, p. 61, and as shown by the affidavit of G. M. Savage attached to plaintiffs' motion for a new trial, Record, Original, pp. 159 to 174; Printed, pp. 87 to 99, and as shown by paragraph No. 5 of Stipulation, supra). The facts are that the original notification, together with the final proof were lost, probably destroyed at the time the Olympia Land Office was burned (Record, Original, ; Printed, p.), but since the notification was numbered 44, Olympia Land Office, it could not have been filed in Oregon, nor before the filing of Notification No. 43, which was filed January 29, 1858 (Record, Original, p. 104; Printed, p. 89). The exact date of the filing is unknown, but it was filed after January 29, 1858, at the Olympia Land Office (paragraph No. 5, Stipulation, supra), and therefore more than *three* years after the signing of the "deed of release" under which the defendant in error claims.

In 1854 Edmund Sylvester *did* doubtless tender with his

proof of settlement (*not final proof of residence and cultivation*) a notification, but this was rejected for the manifest reason that the description of the tract was vague and indefinite and plainly showed that the tract had not been surveyed (Defendant's Ex., Record, page). It was not the tract finally claimed by Sylvester, as will appear by the following blue print map:

The Territory took possession of the tract, used it as a seat of government until the State was admitted, when the State assumed control of the land in question, and subjected it to the same use as the Territory until 1893, when, through its proper officers, it obtained title to the property under and by virtue of the deed of March 21, 1893.


The unshaded lines show the land described in the Survey Plaintiffs Exhibit No.
Red Plat of Plaintiffs Exhibit No
The lines shaded Red are the lines shown by the instrument relied upon by the Defendant as a Notification sworn to before the Surveyor General of Oregon, comprising 328 7 acres
West 41.0
South 78.31
N 3 W 33.45
N 60 E 21

III.

The court erred in deciding that the Territory of Washington had power under the organic act, or otherwise, to acquire the legal title to land and to hold the same without authorization or direction by act of Congress, and in holding that it was authorized or directed to acquire such title to the land in suit (Record, Original, p. 204; Printed, p. 112).

IV.

The court erred in deciding that the State of Washington succeeded to the title of the Territory of Washington under the deed of January 18, 1855 (Record, Original, p. 204; Printed, p. 112).

V.

The court erred in deciding that the deed of Edmund Sylvester and wife, of date January 18, 1855, was not void (Record, Original, p. 204; Printed, p. 112).

VI.

The court erred in deciding that the State of Washington is not estopped by the deed of these plaintiffs, dated March 21, 1893 (Record, Original, p. 204; Printed, p. 112).

VII.

The court erred in not reading all the statutes, deeds and writings together to show the intention and the condition, and in deciding that the second deed did not control (Record, Original, p. 204; Printed, p. 112).

VIII.

The court erred in deciding that plaintiffs' motion for judgment on the pleadings and for lack of a sufficient legal answer, made at the opening, during the trial, and at the close of trial, was properly denied (Record, Original, p. 204; Printed, p. 112).

IX.

The court erred in striking out and refusing to consider all testimony of Mrs. Clara E. Sylvester, offered to show what was the consideration for the execution of the deed of January 18, 1855, and the circumstances surrounding the transaction, and her understanding and intention in making said deed, and the terms of the parol agreement between herself and the officers of the Territory contemporaneous and prior to the execution of the same, relative to the purpose for which the land was deeded; and the court erred in striking out and refusing to admit and consider the deposition of Mrs. Clara E. Sylvester, on the ground that the testimony in said deposition contained was inadmissible in evidence, which deposition is in words and figures following, to-wit:

"State of Washington,

County of King, ss.

Q. 1. Are you one of the plaintiffs in the suit of Clara E. Sylvester and May Sylvester against the State of Washington?

A. I am.

Q. 2. Did you some time in January, 1855, join with your husband, Edmund Sylvester, now deceased, in signing a paper writing running to the Territory of Washington, mentioned and referred to in the hereunto annexed answer of the defendant, State of Washington, which has been served upon you in this action?

A. Yes, I presume I did.

Q. 3. What money consideration was received therefor?

Mr. Booth: Objected to on the ground that it is incompetent, irrelevant and immaterial, and calling for testimony tending to vary the terms of a written contract.

A. Nothing that I know of.

Q. 4. What was the real consideration or condition that induced you to sign the said paper writing?

Mr. Booth: Objected to on the ground that it is incompetent, irrelevant and immaterial, and calling for testimony tending to vary the terms of a written contract.

A. Why, that they should agree to have the capitol there, that it should be the capitol site, and if it was not used for that purpose it should come back to us.

Q. 5. Did you, on March 21, 1893, execute and deliver to the State of Washington a deed for the tract of land in dispute in this suit?

Mr. Booth: Objected to on the ground that it is incompetent, irrelevant and immaterial.

A. Yes, I did.

Q. 6. Was any money consideration received by you for said deed?

Mr. Booth: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. No.

Q. 7. What was the real consideration that induced you to execute said deed?

Mr. Booth: Objected to on the ground that it is incompetent, irrelevant and immaterial and calling for testimony tending to vary the terms of a written contract.

A. That it should continue to be used as a capitol and if not that it should revert back to the heirs.

Et seq.

CLARA E. SYLVESTER."

Record, Original, pp. 204 to 206; Printed, pp. 112 to 114).

X.

The court erred in deciding that the obligations of a contract made between these plaintiffs and the State of Washington, on March 21, 1893, have not been impaired, and their property taken for public use without due process of law and without compensation (Record, Original, p. 206; Printed, p. 114).

XI.

The court erred in deciding that the title to the land conveyed by the deed of March 21, 1893, did not re-invest in the grantors therein, these plaintiffs, upon breach of the condi-

tions therein and demand for possession (Record, Original, p. 206; Printed, p. 114).

XII.

The court erred in holding that the notification of Edmund Sylvester, No. 44, was filed in Oregon (Record, Original, p. 206; Printed, p. 114).

XIII.

The court erred in holding that the description of the land in the notification and the patent were identical (Record, Original, p. 206; Printed, p. 114).

XIV.

The court erred in entering judgment for the land described in the second deed, dated March 21, 1893 (Record, Original, p. 206; Printed, p. 114).

XV.

The court erred in refusing to allow the witness, May L Sylvester, to answer the following question: "You may state the conversation you had with him touching the execution of the deed" (Record, Original, p. 206; Printed, p. 114).

In order that the foregoing assignment and specification of errors may appear of record, the complainants present the same to this court, and pray that disposition may be made thereof in accordance with law and the statutes and Constitution of the United States in such cases made and provided, and plaintiffs in error pray a reversal of the final judgment made and rendered against them herein.

GEORGE MARVIN SAVAGE,
Attorney for Plaintiffs in Error and May Sylvester.

ARGUMENT.

We contend that the plaintiffs are entitled to the writ prayed for in their complaint, for that:

I.

The instrument under which the defendant claims title was void.

(a) Because the purported grantors had nothing but a "Squatter's right," the settler at the time of the execution of the instrument not having complied with all the provisions of the Oregon donation law. He had not filed his notification. He had not had the claim surveyed. He had not "proved up." He had not paid the fees by law required and his proof had not been accepted by the Commission of the General Land Office.

(b) Because the description of the land sought to be conveyed was vague and indefinite.

(c) Because the instrument was not sealed as by law required.

(d) Because the grantee named therein was not authorized by law to take title to land; and,

(e) Because the same was against public policy and prohibited by statute.

II.

That the heirs at law of Edmund Sylvester, until the delivery of the deed of March 21, 1893, were the owners of the land in controversy, or at least were the owners of the legal title, and on the breach of the conditions, the legal title reinvested in them.

III.

That the state is estopped to deny that it held the land in controversy under the deed of March 21, 1893.

These three propositions cover Assignment of Errors. I, II, III, IV, V, VI, XI, XII and XIII and will be taken up in their order.

I.

"The Instrument Under Which Defendant Claims Title Was Void."

(a) "Because the purported grantors had nothing but a 'squatter's right.'"

Under the Oregon Donation Law neither legal nor equitable title vests in the settler before his *full* compliance with *all* the requirements of said act. Until he has fully conformed to the terms of the act he has nothing but a mere possessory right to the land.

This has been established by an unbroken line of decisions of your court, followed by the inferior federal tribunals, and state courts.

In Hall v. Russell, 101 U. S. 509, Chief Justice Waite gave the following clear exposition of the act:

> "The opening words of Section 4 are 'that there shall be, and hereby is granted.' This is appropriate language, in which to express a present grant, but as was well remarked by Mr. Justice Field for the court in Missouri, Kansas and Texas Railway Co. v. Kansas Pac. Ry. Co., 97 U. S. 491, 'It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.' *There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee.* If, then, the law making the grant indicates a future grantee and not the present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time * * * In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named. Coming then to the present case, we find that the grantee designated was any qualified 'Settler or occupant of the public lands * * * who shall have resided upon and

> cultivated the same for four consecutive years, *and shall otherwise conform to the provisions of the act.' The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil.* The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory having the other requisite qualifications, but beyond this nothing passed until *all* was done that was necessary to entitle the occupant to a grant of the land. * * *
>
> "We conclude, therefore, that under Section 4 there was no grant of the land to a settler until he had qualified himself to take as grantee, by completing his four years' residence and cultivation, *and performing such other acts* in the meantime as the statute required *in order to protect his claim and keep it alive.* Down TO THAT TIME HE WAS AN AUTHORIZED SETTLER ON THE PUBLIC lands, *but not a grantee.* His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will."

Note the plain language used:

> "The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and *had otherwise conformed to the act.* Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the *legal title* from the United States became vested."

In other words, the settler's *equitable right* to a transfer of the *legal* title did not vest until he had complied with *all* the requirements of the act.

In this case, however, the state court held—not that the equitable right had become vested, but that the legal title itself had become vested in a settler who had *complied with residence alone*, but whose lands had not been located and set apart to

him by reason of survey, notification, final proof, issue of donation certificate, acceptance of proofs, etc.

In Vance v. Burbank, 101 U. S. 514—where, as in the case at bar, final proof had not been made—it was expressly held that *final proof must be made before any title vests,* viz.:

> "In Hall v. Russell (Supra P. 503) we held that a grant to a settler did not take effect as against the United States, so as to pass anything more than a possessory right in the lands occupied until the completion of the four years' residence and cultivation, and a *full* compliance with all the other conditions of the act. * * * The question here is whether the wife, or her heirs, gets anything before the husband, or some one for him, proves up the claim. The 'Settler' is made by the statute the actor in securing the grant. *He must notify the surveyor-general of his claim. He must occupy and cultivate the land, and otherwise conform to the provisions of the act, and he, or some one for him, must also make the final proof.*"

In Maynard v. Hill, 125 U. S. 215, Mr. Justice Field quoted extensively, with approval, from Hall v. Russell and Vance v. Burbank, and said:

> "In Hall v. Russell, 101 U. S. 503, the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditions *were fully performed.*"

In the recent case of Oregon & C. R. Co. v. U. S., 190 U. S. 195, where the settler had *filed his notification* with the surveyor-general (see p. 193), the former cases were reaffirmed, at p. 195:

> "It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those 'who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act.' Hall v. Russell, 101 U. S. 503; Maynard v. Hill, 125 U. S. 190. * * *

> *Even admitting that the donation notification was on file* in the office of the surveyor-general, there was no proof, required by Section 7 of the act to be filed within twelve months from the time of settlement, that the settlement and cultivation required by the act had been commenced; nor after the expiration of four years from such settlement was there any *proof* of continued residence or cultivation, required by the same section."

"Final proof of continued residence was necessary to the life of this donation."

U. S. v. Ore. & C. R. R. Co., 133 Fed. 954.

The federal courts of Oregon and Washington have also held that the settler must conform fully to the requirements of the act before he is invested with title to the soil.

In Cutting v. Cutting (Oregon), 6 Fed. 262, the settler Cutting had settled in April, 1849, made proof May 3, 1864, *but had not paid the fees required by law*, and died in 1868 (p. 260). The court held that under the decision in Hall v. Russell, and other decisions of your court, the interest of Cutting terminated with his life, and his wife and children took by purchase from the United States, and not by descent (p. 263).

In Henry v. Lilliwaup Falls Land Co. (Wash.), 83 Fed. 748, it was said:

> "It is my opinion that title could not pass under the donation law except to a specific tract within established boundaries, and after a *survey* and marking of the lines and setting of the corners, in accordance with law.
>
> "Finally, the *proof of cultivation and residence* required by the the seventh section was never made. * * * Failure in this essential is alone of itself sufficient to defeat the claim asserted by the complainant to the land as an heir of the settler. (Vance v. Burbank, supra.)"

In the carefully considered case of Hershberger v. Blewett, 55 Fed. 177, the following pertinent ruling was made:

> "Counsel for the complainants have argued that Strickler, by residing upon and cultivating the land as

alleged in the bill, perfected his right without making the final proof required by the act, * * * that is to say, the title passed by virtue of the donation law itself, and vested in the settler immediately upon completion of the prescribed four years' residence and cultivation, and that final proof and the issuance of a patent are not necessary to work a transfer of title from the United States to the grantee, * * *

"I think that an answer to this quaere, in harmony with all the decisions of the national courts, is found in the general principle that *title does not pass from the United States by a conditional grant of public land so long as the patent is withheld, and any act required of the grantee as a condition of the grant remains uncompleted:* Railroad Co. v. McShane, 22 Wall. 444; Shepley v. Cowan, 91 U. S. 330; Colorado Co. v. Commissioners, 95 U. S. 265.

"In Wilcox v. Jackson, 13 Pet. 498, the supreme court stated the rule even broader than I have stated it. In the opinion of the court by Mr. Justice Barbour it is said, 'That with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done, in words of present grant. * * * The general rule is what we have stated, and it applies as well to pre-emptions as to other purchases of public lands.'"

There must also be an acceptance of the proofs.

"In Stark v. Starrs, 6 Wall. 402, at p. 413, it is held that the right of Stark to a patent became perfected when the certificate of the Surveyor-General and accompanying proofs were received by the Commissioner of the General Land Office, *and he found no valid objection to them.* That is to say, if the donation act of 1850 was applicable to the lands, his right to a patent became perfect when the certificate of the Surveyor-General and accompanying proofs showed, in the judgment of the Commissioner, a compliance with its requirements."

And again in Traver v. Tribou, 15 Fed. Rep. 31, this ruling was made in regard to acceptance of the proof:

"On September 29, 1853, the settler, Lownsdale, made his final proof of the residence and cultivation required by the act, and had otherwise conformed thereto, so that according to the construction given to the donation act by the supreme court in Hall v. Russell, 101 U. S. 503, as soon thereafter as it was ascertained *by the proper authority* that this proof was sufficient, he became a qualified grantee thereunder. * * * The right to the patent, as was said by Mr. Justice Field in Starrs v. Stark, 6 Wall. 413, became perfect when the certificate of the Surveyor-General was received by the Commissioner of the General Land Office, and he found no valid objection thereto." P. 33.

Early Oregon Cases Overruled.

The Oregon state courts now hold to the doctrine of full compliance being necessary, having overruled their former decisions in the recent case of Quinn v. Ladd, 37 Ore. 261 (59 Pac. Rep. 459), from which we quote:

"For many years after the enactment of the donation law it was held by this court and by the inferior federal courts * * * that the donation act was a grant in praesenti, and vested in the settler an estate in fee from the filing of his notification, subject to be defeated by his non-compliance with the requirements of the act. *But this view was not accepted by the Supreme Court of the United States, and its decision is, of course, controlling.* * * * It must be regarded, therefore, as authoritatively determined that a settler under the donation law did not acquire an estate of inheritance in the land until the completion of the required residence and cultivation, *and a full compliance with the other conditions of the act.*"

See also

Bullene v. Garrison, 1 Wash. Ter. 590.
Maynard v. Hill, 1 Wash. Ter. 327.
McSorley v. Hill, 27 Pac. 554, 2 Wash. 638.

In Maynard v. Valentine, 2 Wash. Ter. 18, the court said:

"She asserts that such a right was then hers under the provisions of Section 4, of the donation law. But by

that section the donation of six hundred and forty acres, one-half to himself and the other half to his wife, to be held in her own right, is given to that married man only *who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act.*" (The italics are the courts.)

The decisions of the Land Department support our contentions.

A. J. Allen Claim, 7 L. D. p. 547.
Vetch v. Park, 14 L. D. p. 490.
The Varner Claim, 22 L. D. p. 569.
Stone v. Connell Heirs, 23 L. D. p. 166.

The Act of July 26, 1894.

Mere residence for the required period is not sufficient. The settler must perfect his inchoate rights by conforming to *all* the requirements of the act. Congress, recognizing this, and desiring to protect dilatory settlers, on July 26, 1894, passed an act extending the time within which final proof could be made under the Oregon Donation Act. (28 Stat. L. 122; Suppl. Rev. Stats. V. 2 p. 204.)

Section 1 of said act provided that all persons who have made proof of settlements on tracts of land, and given notice that they claimed such lands as donations, but have failed to execute and file in the proper land offices proof of their continued residence on and cultivation of lands so settled upon and claimed, *so as to entitle them to patents* therefor, should have until January 1, 1896, the right to make and file final proofs and *fully establish their rights* to donations of land under the aforesaid act of Congress and no longer; and all claimants who shall fail to make and *file final proof and perfect their claims* to lands before that time shall thereafter be held to have abandoned their claims, and their land was to be restored to the public domain.

This act has been construed to be intended

"for the relief of those who had resided continuously upon and cultivated the lands specified in the original

> donation notifications, but had through mistake or negligence omitted to *make and file their final proofs and fully establish their rights to such donations.*"
>
> Oregon & C. R. R. Co. v. U. S., 190 U. S. 195.

And see circular of the Department of the Interior, April 8, 1895 (20 L. D. 290).

If it was necessary for Congress to pass a special act in order that settlers who had resided continuously upon their lands and given notice could make final proof and thereby *"fully establish their rights,"* it seems plain that a settler whose lands had not been surveyed, and who had not made his final proof, had not fully established his right, and had not become vested with the legal or equitable title.

The rule that *all* the requirements of the granting provisions of the act must be complied with by the settler before title vests is not confined to the Oregon Donation Act. It is the uniform ruling of the courts upon the land laws.

In McCune v. Essig, 118 Fed. Rep. 280—a homestead case arising in the District of Washington—the circuit judge entertained the following views:

> "No right to a patent is acquired under the homestead law until all the conditions precedent prescribed by law have been fully performed.
>
> "The provisions of the homestead law are similar to the Oregon Donation Law, *and the policy of the government is identical in both statutes*, and it is my opinion that the decision of this case must be controlled by the case of Hall v. Russell, 101 U. S. 503."

The Circuit Court of Appeals commented upon this decision, saying:

> "Nor do we find error in the conclusion which was reached by the Circuit Court on the merits of the case. The estate granted to a homestead settler is granted on conditions precedent. These conditions are residence for the required time, cultivation, and *final proof*. Until *all*

of these conditions are complied with the law gives him no more than the right of possession. * * *

"The case of Hall v. Russell, 101 U. S. 503, 25 L. ed. 829, is, we think, directly in point. That was a case which involved the construction of the donation act, *an act in which the terms of the grant are much stronger* than in the case of the homestead law, the language thereof, being: 'There shall be, and hereby is, granted: (2) the grantee being any qualified settler or occupant of the public lands' who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act." 122 Fed. Rep. p. 590.

This case was affirmed on the merits.

McCune v. Essig, 199 U. S. 388.

A homesteader has not legal title before final proof.

U. S. v. Turner, 54 Fed. Rep. 228.

Decisions of U. S. Courts Control.

The above decisions are clear, positive and harmonious. The law has become settled. Decisions of state courts are not binding in cases involving the validity of conveyances of the public lands of the United States, as the questions when title passed, and whether it passed, and to whom, depend on the laws of the United States.

McCune v. Essig, 199 U. S. 390.
Anderson v. Carkins, 135 U. S. 486.
Wilcox v. Jackson, 13 Pet. 517.
Proevstel v. Hogue, 15 Fed. Rep. 583.
Cunningham v. Krutz, 82 Pac. Rep. 109, 41 Wash. 190.

The Territory Was Guilty of Laches.

Edmund Sylvester and wife continued to reside on his claim, after making the first deed, until after the patent.

It is only necessary that residence and cultivation should be made upon some part of the claim on which the settler proves up.

U. S. v. Tichenor, 12 Fed. Rep. 426.

The Territory, with full knowledge, permitted him to prove up and establish his legal title to his full claim, and must be held to have waived any right beyond a mere possessory right, subordinate to his high title.

This point was clearly covered in the opinion in Hall v. Russell, 101 U. S. p. 512, viz.:

> "The grant was to the occupant who had himself conformed to the provisions of the act. The sale of a possessory right could have no other effect than that of an abandonment of the settler's claim, and a grant to the purchaser of the right to enter upon the abandoned lands and begin a settlement of his own."

If the position taken by the state court is correct, then the passage by Congress of the act of July 26, 1894, allowing claimants under the Oregon Donation Land Law two years in which to make their final proof, was idle and useless. We submit that the interpretation that we contend this court has placed upon the Oregon Donation Law in Hall v. Russell, 101 U. S., and Vance v. Burbank, 101 U. S., is the interpretation put upon the act by the law making body. The act of January 18, 1894, was fully discussed in the lower house by the Hon. Binger Hermann, Congressman from Oregon, as will appear from the Congressional Record, Vol. 26, pages 249, 250 and 251, and in the Senate, Senator Dolph from Oregon, same volume, pages 3309, 3310, 3311 and 7573. The general discussion, in which Hon. Joseph Cannon and other members of the house participated, is reported on pages 7715 and 7596 of the same volume.

The Defendant's Cases.

The state court based its decision upon the cases of Barney v. Dolph, 97 U. S. 652; Brazee v. Schofield, 124 U. S. 495, and Roeder v. Foux.

The first two cases are not in point because in each of them the settler conveyed *after* his residence, final proof and full compliance with all the requirements of the act.

In the case of Barney v. Dolph, 5 Ore. 202, it was admitted that the settler Waymire and wife had resided four years, made final proof and "performed all the requirements of the act so as to entitle them to patent." Their deed was objected to because "made before issuance of patent on that ground alone."

The original donation act prohibited sales before patent, and the only question was whether, after the amendment, a sale could be made before patent but after a full compliance with the requirements of the act by the settler.

In Barney v. Dolph, 97 U. S. 652, it is shown that the deed was made "after they had made and filed in the proper office the requisite *final proof* of settlement, continued residence and cultivation."

Mr. Chief Justice Waite, in the opinion, makes this point very clear, at p. 653:

> "*The point to be decided* is not whether, before the amendment, such a conveyance could have been made, or whether if the conveyance had not been made, the children or heirs of a deceased husband or wife would take by descent or purchase, or whether the grant from the United States was one which took effect from the time of the passage of the act, or a subsequent entry and settlement, but whether, *after the amendment*, the husband and wife held by such a title that, *before patent, but after their right to one had become absolute*, they could sell and convey so as to vest in the purchaser either a legal or an equitable estate in fee simple."

At p. 655, it is stated that the grant was to "white settlers then residing * * * provided they had resided upon and cultivated the land, or should do so, for four consecutive years, *and otherwise conformed to the provisions of the act.*" "After the prohibition of sales was removed, all who had *perfected* their right to a patent for the lands they had occupied and cultivated for the requisite length of time, other than the married beneficiaries under Section 4, could sell." P. 657.

Mr. Chief Justice Waite also delivered the opinions in the later cases of Hall v. Russell and Vance v. Burbank, and they are not conflicting.

In Hershberger v. Blewett, 55 Fed. Rep. 170, Judge Hanford, answering the argument of counsel that the donation act was a grant in praesenti, discusses the case of Barney v. Dolph, as follows:

> "On the contrary, the opinion of Chief Justice Waite in that case is perfectly harmonious with his opinion in the later case of Hall v. Russell, supra, in which case it is expressly held that the act cannot be construed as a grant in praesenti, and that beyond a present right to occupy and maintain possession, so as to acquire a complete title to the soil, nothing passed by virtue of the act UNTIL ALL WAS DONE that was necessary to entitle the settler to a grant of the land." P. 178.

In Brazee v. Schofield, as in the Dolph case, the notification, survey, final proof, probate proceedings, etc., *were all long before the date of the deed* (see 2 W. T. p. 209, and 124 U. S. 497), hence it is not in point under the dissimilar facts in this case. In it the case of Hall v. Russell, 101 U. S. 503, was distinguished, p. 502, and at p. 497 the United States Supreme Court said:

> "By the fourth section of this act, a grant of land was made to every white settler * * * and who should reside upon and cultivate the same for four consecutive years *and otherwise conform to the provisions of the act.*"

At p. 501:

> "It is undoubtedly true that the donation act required for the completion of the settler's right to a patent not only that he should reside upon the land and cultivate for four years, *but that he should notify the Surveyor-General of the precise tract he claims.*"

The territorial court, in deciding the Brazee case, based its decision solely on the ground of equitable estoppel.

"In conclusion we will say that in our opinion the de-

cision of this case may be satisfactorily planted on the doctrine of estoppel."

The case was affirmed on its equitable features by the supreme court, but gave a very different construction of the Oregon Donation Law, a construction in harmony with that of Hall v. Russell and Vance v. Burbank (see 124 U. S. 505).

(b) "Because the description of the land was vague and indefinite."

The deed of January 18, 1855, is void for further reason that the description of the real estate sought to be conveyed is vague and indefinite, and the property can be located *only* by the aid of the second deed, or the deed of March 21, 1893 (see paragraphs No. 6 and 9, Stipulation, supra). The description of the tract in the deed of January 18, 1855, after reciting that it is in the County of Thurston, and in Section 23, Township 18 North, Range 2 West, reads:

> "Commencing at a point south 24 degrees 23 minutes west of nineteen and ten (10) one hundredths chains from the northwest corner of Main and Union streets; thence south seven (7) chains and fifty (50) links; thence west eight chains and fifty-eight (58) links; thence north forty-seven degrees west, one (1) chain seventy-three links; thence north fifty-eight (58) degrees and thirty minutes, one (1) chain sixty (60) links; thence north sixty (60) degrees west one (1) chain and ninety-three (93) links; thence north three (3) and thirty (30) minutes west, two chains and eighty (80) links; thence north thirty-eight degrees west, one (1) chain and seventeen (17) links; thence forty-five degrees west, one (1) chain and eighty-seven (87) links; thence east sixteen (16) chains and four (4) links to the place of beginning" (Record, Original, p. 3, Printed, pp. 4 and 5).

Our contention is that there is nothing in the deed to locate the point of beginning. Main and Union streets may be in any number of towns or villages in the County of Thurston. It might not be out of place at this point to say that as a matter of fact there never was an official plat of the Town of Olympia, Territory of Washington, placed on record. With the

aid of the second deed the point of beginning can be located as being so many chains from the corner of Main and Union streets, in the City of Olympia. The defendant in error evidently felt that our position was the correct one, and this omission a fatal one to its title, for the reason that in its initial brief, filed in the Supreme Court of the State of Washington, counsel has attempted to correct this error by printing in the description the interpolation "in the City of Olympia, County of Thurston," thus completing the description, but since the City of Olympia had no corporate existence until about 1872, and at the time of the deed of 1855, if known at all, it was known as the Town of Olympia, the attempt was an evident failure. Later in this brief we contend that the two deeds must be read together. At this time our contention is that one of the considerations which led the State to seek the second deed, or deed of March 21, 1893, was the correction of this error in description (see paragraph No. 7, Stipulation, supra) and this was the consideration for the insertion in the second deed of the condition subsequent of forfeiture, and which condition the trial court found had been violated.

(c) "Because the instrument was not sealed as law required" (Record, Original, p. 84; Printed, pp. 52-53.)

The first deed was void because not properly executed. At the time of its execution the strictest common law prevailed in the Territory of Washington. A deed to pass title had to be signed and sealed. The seal must have been a foreign substance attached to the paper or parchment. Some years later the legislature passed an act declaring a scroll to be a seal, but it could not make valid an instrument without a seal, any more than an instrument without a signature.

(d) "Because the grantee named therein was not authorized by law to take title to the land."

The Territory of Washington, having no attributes to sovereignty, had no power to acquire land. Its Organic Act gave no power to acquire title to land. It was not authorized or directed by act of Congress to purchase, or take title. The land was public land of the United States. A territory is a mere dependency of the United States. It is a creation by the government for

temporary purposes only, having such limited powers as are delegated and granted under the terms of its Organic Act. The artificial body politic thus emanating from federal power is completely subordinate to the general government, and subject to legislative authority of Congress, as a necessary incident of immaturity, and possesses none of the attributes of sovereignty. The relation between the government and the territory may be said to be *sui generis*. The general government, *Parens patriae*, retains entire dominion and sovereignty over the territory, determines what its powers shall be, who shall execute them, and approves or disapproves of territorial legislative enactments.

Insurance Co. v. Canter, 1 Pet. 543.
Snow v. U. S., 18 Wall. 321.
Natl. Bank v. County of Yankton, 101 U. S. 133.
Murphy v. Ramsey, 114 U. S. 44.
Mormon Church v. U. S., 136 U. S. 47.
Endleman v. U. S., 86 Fed. Rep. 549.
Reynolds v. People, 1 Col. 179.
People v. Daniels, 6 Utah 288 (22 Pac. Rep. 159).

"The rights of a territory in regard to the public land within its limits cannot be held to be so extensive as those of a state. A territory is not properly sovereign. It is an organization through and by means of which Congress for a time governs a particular portion of the country. Its rights are those which are set forth in the Organic Act."

Opns. Atty. Gen. Vol. 16 p. 115.

"Sovereignty, then, signifies independence, absolute freedom and liberty, and a superiority to and exemption from every foreign or extraneous influence." * * *

"Under the authority of Sec. 3, Art. IV, of the Constitution, Congress has authorized and established temporary governments for the territories. * * * These governments were, and now are, and at all times have been, under the complete control of Congress, and subject to abolition, modification or repeal by the action of Congress. These inherent infirmities in the government and legislative enactments of the territories at once rob

them of all the essential attributes of sovereignty and make them provinces over which the United States exercises supreme control. With these sovereign powers residing in the general government it seems idle to contend a territory is sovereign and supreme in any department of its authority."

Montana v. Lee, 2 Mont. 124.

The Territory of Washington did not take title to its school lands, but the same remained in the public lands of the United States.

Peterson v. Baker, 39 Wash. 277.
Barkley v. U. S., 3 Wash. Ter. 525.
Burrows v. Kimball, 11 Utah 149 (41 Pac. Rep. 719).
U. S. v. Elliott, 74 Fed. Rep. 93.
U. S. v. Elliott, 12 Utah 119 (41 Pac. Rep. 722).
U. S. v. Bisel (Montana), 19 Pac. Rep. 25.
Keane v. Brygger, 3 Wash. 338 (28 Pac. 856).

The Organic Acts of the Western Territories were almost identical.

Vol. 28 p. 59, Amer. & Eng. Encyc. Law, 2nd ed.
Maynard v. Hill, 204 U. S. 125.

Congress uniformly appropriated money for the "erection of suitable public buildings" only.

Organic Acts, Ore. Sec. 15, 9 Stat. 329; Minn. Sec. 13, 9 Stat. L. 403; Utah, Sec. 12, 9 Stat. L. 457; Neb. 10 Stat. 1, 27; Kansas, 10 Stat. L. 286.

Section 13, Organic Act Wash. Ter. 172, appropriated $5,000.00 "to be applied by the Governor *to the erection of suitable buildings at the seat of government.*"

This is the same provision and amount as that contained in the Organic Act of Oregon, *supra:*

"When divers laws have been passed wherein a phrase of plain significance has been used during a long period the precise legislative intent is made clear."

Koch v. Vanderhoff, (N. J.) 9 Atl. 772.

Congress could not have intended—and the intention always governs—by organizing a temporary, subordinate form of government for a territory to grant powers which only pertain to permanent, independent, sovereign states. The implication of powers arising under a minor statutory provision cannot be so extended as to broaden and change the general expressed grant of powers, and the evident scope and purpose of the statute as a whole. A power that is not necessary will never be implied to expand a minor provision.

The authority was "to locate and establish" the seat of government. The seats of government of the territories were all subject to change. It is unreasonable to claim that Congress intended to authorize a permanent investment in land while the territorial capitols were all "on wheels" which would not be needed if the capitol were changed (as was attempted in Washington Territory, see Seat of Government case, 1 Wash. T. 115). The rule is, *"Expressio unius est exclusio alterius."* An appropriation "for the erection of monuments or memorial tablets for the purpose of marking the position of each of the commands of the federal army engaged at Gettysburg" was construed not to convey the power to purchase lands for the sites of the monuments.

"The specific language that the money is for the erection of monuments or tablets applies it to that use, and rebuts the implication that it may be applied to any other purpose."

Garland, 19 Opns. A. G. 79; and see Garland, 18 Opns. 147.

An appropriation "for improving Great Kanagha River, West Virginia, continuing improvements $187,000.00," was construed not to convey power to purchase land, although the original improvement contemplated locks and dams.

Garland, Opns. A. G. Vol. 19 p. 34.

"But if Congress has all the money of the United States under control, it also has the whole English lan-

guage to give it away with; and it is so easy to use definite terms in a law like this, that when they are not used we will presume they were not meant."

Black, Opns. A. G. Vol. — p. 59.

Two years after the first deed, Congress appropriated:

> "For the erection of a temporary capitol for Washington Territory, thirty thousand dollars, and for a penitentiary in the same territory, twenty thousand dollars, *inclusive of the sites of the buildings;* provided, that each building shall be finished for the sums herein appropriated" (11 Stat. Large 227).

This later appropriation precludes any supposition that Congress by the first appropriation intended to confer power to purchase, or directed a purchase of the site or appropriated money therefor.

Not merely a territory, but even the United States cannot purchase land without authorization by act of Congress.

> Sec. 3736, U. S. Rev. Stats.
> U. S. v. Tichenor, 12 Fed. Rep. 421.

In that case a settler under the Oregon Donation Act had deeded to the United States, *before final proof.* It was said:

> "Neither did these conveyances of William and Elizabeth Tichenor have the effect to vest any interest in the premises to the plaintiffs. Irrespective of the fact that the grantors in these deeds had nothing in the premises to convey except the possessory right of the settler, William Tichenor, there was no authority upon the part of the grantee to purchase, and therefore they were as conveyances null and inoperative. It is not claimed that there was any law authorizing any one to purchase this property, *and without such authority the purchase was void.*"

But in any event the first deed running to the territory alone conveyed only a life estate. It was not a deed to the sover-

eign. The common law was in force in Washington Territory at the date of the first deed.

Art. IV, Ordinance of 1787.
Sec. 14, Organic Act of Ore. (Act Aug. 14, 1848).
Vol. 6, Amer. & Eng. Encyc. Law, 2nd ed. 280.
Wagner v. Law, 3 Wash. 500 (28 Pac. 1109).
Richards v. Redelshiener, 36 Wash. 328.

Under the common law, the conveyance must be to the grantee, and his heirs, in order to convey anything more than a life estate.

Williams, Real Property, p. 123.
Dembitz Land Titles, 323.
Anderson v. Logan, (N. C.) 11 S. E. 361.
Nicholson v. Caress, 45 Ind. 483; 59 Ind. 39.
Rector v. Waugh, 57 Amer. Dec. 251.

The rule is the same where a corporation is a grantee

In early times conveyances to corporations were generally gifts to ecclesiastical corporations, and gifts to such corporations were usually in frankalmoign, and upon the dissolution of the corporation the land held by it in frankalmoign escheated to the donor, for the donor was the lord. Hence arose the ruling that on the dissolution of the corporation all its land came back to the donor.

As was said in Dean and Canons of Winsor v. Webb, Gobd. 211:

> "That if a man give lands unto Dean and Canons, and to their successors, and they be dissolved; or unto any other corporations, that the donor shall have back the lands again, for the same is a condition in law annexed to the gift."

This decision of Lord Coke and his fellow judges of the common bench has been often followed.

Per Lord Hardwicke, in A. G. v. Gower, 9 Mod. 224; per Lord Mansfield, in Burgess v. Wheate, I. W. Bl 123,

165; per Lord Denman, in Mayor of Colchester v. Brooke, 7 Q. B. 339, 384; Folger v. Chase, 18 Pick. 661; Life Assn. v. Fassett, 102 Ill. 315; Moultrie v. Smiley, 16 Ga. 289, 298, 299.

(e) "Because the same was against public policy and prohibited by statute."

The affidavits of non-alienation required of the settlers under the pre-emption, homestead and donation acts, are substantially the same. They all prohibit the settler from acquiring title for another. Without statutory prohibition, such is the public policy of the United States governing its public lands.

Sections 4, 12, Donation Act.
Smith v. Henry, 41 Fed. Rep. 709.
Warren v. Van Brunt, 19 Wall. 654.
McCrillis v. Copp, 31 Fla. 108, 12 So. 646.
Robinson v. Jones, 31 Neb. 29, 47 N. W. 482.
Hardin v. Cullins, 8 Nev. 53.
Mellison v. Allen, 30 Kansas 382, 2 Pac. 99.
Horseman v. Horseman, (Ore.) 72 Pac. 699.
Moore v. Moore, 130 Cal. 110 (62 Pac. 294).
Fleischer v. Fleischer, 11 N. Dak. 221, 91 N. W. 51.
Hafeman v. Gross, 199 U. S. 345.
Anderson v. Carkins, 135 U. S. 483.

In Coey v. Low, 36 Wash. 17, it is said:

> "The general rule of law is that all contracts which are against the general policy of the common law or contrary to the provisions of any statute, are void; and a contract in violation of a statute is void, although the statute fails to provide expressly that contracts made in violation of its provisions shall not be void."

II.

That the Heirs at Law of Edmund Sylvester Until the Delivery of the Deed of March 21, 1893, Were the Owners of the Land in Controversy, or at Least Were the Owners of the Legal Title, and on the Breach of the Conditions the Legal Title Reinvested in Them.

The plaintiffs through Edmund Sylvester hold the legal title to the land in controversy, because the legal title does not pass until the patent issues.

The patent is the title deed to the land whereby the government conveys the legal title to a patentee invested with an equitable right thereto.

"The patent is the instrument which passes the legal title, and until it is issued the legal title remains in the government."

U. S. v. Detroit Lumber Co., 200 U. S. 338.

"The rule is that the legal title remains in the government until the issue of the patent."

Mich. Land & Lumber Co. v. Rust, 168 U. S. 593.

"The patent of the United States is the conveyance by which the nation passes its title to portions of the public lands."

Smelting Co. v. Kemp, 104 U. S. 636, 645.
Gibson v. Cheateau, 13 Wall. 102.

"It was said by this court, as early as 1839, in Wilcox v. Jackson, 13 Pet. 498, that with the exception of a few cases, nothing but the patent passes a perfect consummate title."

Shiver v. U. S., 159 U. S. 495.

"It is a general principle that title does not pass from the government so long as the patent is withheld."

Hershberger v. Blewett, 55 Fed. 170.

"So far as we are advised, none of the cases go to the extent of holding that the legal title passes before proof of residence and cultivation has been made and filed as required by law."

Bolton v. LaCamas, 10 Wash. 249.
And numerous decisions of state courts.

We contend that the legal title to the land passed to the patentee, Edmund Sylvester, and to the State of Washington, by the deed of his heirs at law, these plaintiffs, dated March 21, 1893, and has become reinvested in said grantors by reason of the breach of the condition subsequent in said deed.

"It is among the elementary principles of the law that in actions of ejectment, the legal title must prevail. *The patent of the United States passes that right.* Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce."

Steel v. Smelting Co., 106 U. S. 452.
Johnson v. Christian, 128 U. S. 382.
Bagnell v. Broderick, 13 Pet. 450.
Carter v. Ruddy, 166 U. S. 495.
Redfield v. Parks, 132 U. S. 45.
Doe v. Aikem, 31 Fed. 395.
Harden v. Cullins, 8 Nev. 56.
Slaght v. N. P. R. Co., 39 Wash. 383.

The State pleaded a legal title.

Paragraphs 2 and 3, first affirmative defense; paragraph 1, second affirmative defense; paragraph 1, counterclaim.

During the trial it announced that it stood on its alleged title (Record, p. —; Printed, p. —), and the courts have so held. (Opinions Record, Original, pp. 175 to 200; Printed, pp. 99 to 110.)

The State did not plead equitable estoppel against plaintiffs, and cannot be given relief in equity.

Quimby v. Conlan, 104 U. S. 421.
Interstate Sav. & Loan Assn. v. Knapp, 20 Wash. 225.
And cases there cited.

In Gibson v. Chouteau, 13 Wall. 103, this court said:

> "In several of the states * * * equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defense to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments. * * * In Maguire v. Vice, the Supreme Court of Missouri said: * * * 'When a party by his pleadings sets forth a merely legal title, he cannot on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it, and this must be done, whether he is seeking relief as plaintiff or defendant,' but neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by the plaintiffs or defendants, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States without trenching upon the power of Congress in the disposition of the public lands."

And the facts must be pleaded in such a manner that it is apparent the pleader intended to rely upon some equitable matter.

"Counsel for defendant claim that the facts stated in this defense were also relied upon as a bar to the action by way of estoppel. But they are not pleaded as such."

Fed. Cas. No. 9794, Moreland v. Marion Co.

The State is not a bona fide purchaser. At best it is but a donee under a gift. The essentials of valuable consideration and absence of notice of imperfect title are lacking.

> "The law is well settled that the purchaser of an equitable title takes only such interest in the property as

his grantor had at the time of his purchase. * * * It purchased the land before the issuance of a patent. The legal title was still in the government. It therefore obtained by its purchase only an equitable interest in the land, and is not for the reason stated entitled to protection as a bona fide purchaser."

Cal. Redwood Co. v. Little, 79 Fed. 856.
U. S. v. Ore. Ld. Co., 148 U. S. 31.

"The doctrine which protects bona fide purchasers without notice is applicable solely to purchasers of a legal title; and the purchaser of an equitable interest purchases at his peril."

Shaufe v. Griffiths, 4 Wash. 165.

Deeds which operate under the statute of uses, such as bargain and sale deeds, require a valuable consideration to support them.

Jackson v. Sebring, 16 Johns. 515, 8 Amer. Dec. 357.
Wood v. Beach, 7 Vt. 522.
Chiles v. Colman, 2 March (Ky.) 296.
1 Amer. & Eng. Encyc. Law, 683.

The State has never pleaded nor proved a purchase. It relies on a deed with a nominal consideration of one dollar, which has been contradicted, and the Territorial Act of 1854 recited that the deed is a "deed of release * * * without expense to the Territory."

Extracts from the Journal of the Territorial Legislatures, offered in evidence (Record, Original, p. —; Printed, p. —), show that the Territory was at all times fully aware of the imperfect and inchoate title to Mr. Sylvester.

When the act for the location of the seat of government was before the Territorial House (p. 28, House Journal, 2nd Sess. 1854), it was referred to a select committee of five, appointed to carry out its provisions. Three of the five comprising the committee reported January 29, 1855 (p. 124):

"That having examined the deed made to the Territory of Washington to the land described in said act, and

> also the title of the persons making such deed, *are not satisfied that the title thus conveyed is unobjectable* and free from the possibility of being successfully contested."

The minority reported that:

> "The undersigned are of the opinion that the title to the Territory of Washington is as secure as any title can be under the present condition of the laws of Congress relating to land in this Territory." (Page 156.)

And, again, in 1857 (5th Sess. House, p. 54), when the majority of a committee on public buildings had reported in favor of the passage of an act providing for the erection of public buildings on this tract, the minority committee reported that:

> "From the most thorough examination of the subject that could be made in the brief space of time allowed to make this report, the undersigned is necessarily led to the conclusion that the title to the land on which the present capitol is located is insufficient and will not warrant a further expenditure of money appropriated by Congress for the construction of the capitol."

III.

The State is Estopped to Deny That It Held the Land in Controversy Under the Deed of March 21, 1893.

The legal title to the land passed to the State by the deed of these plaintiffs and reverted to them upon breach of the condition in the deed. Having requested the deed conveying legal title, the State is estopped to deny the condition expressly assented to by its acceptance of the deed, and the validity of the title thereby conveyed.

The sole consideration for the deed from these plaintiffs to the State of Washington was the following contract or condition:

> "Provided, however, that this deed is made and accepted upon the express condition that said tract shall be

> and remain the site of the Capitol of the State of Washington, and that in the event of the breach of the foregoing conditions or in the event of the location of the capitol elsewhere than upon said tract, these presents shall be null and void." (See paragraph No. 7, Stipulation, supra. Record, Original, p. 32; Printed, p. 19.)

It was decided that the above clear and customary words created a condition subsequent, and that such condition had been broken. (Record, Original, p. 191; Printed, p. 103.)

But the state court decided further:

> "They argue, further, however, that the State having sought for and obtained the second deed is now estopped from asserting that it holds the land under a different tenure than that expressed in such deed. But we cannot think the conclusion necessarily follows from the conduct of the State. Doubtless the appellants could have made it a condition on giving the second deed, if the State would have consented, that the land should revert to them in case the State should cease to use it as a capitol site, but they did not do this. The remedy reserved for breach of the condition was that the deed itself should be void—that is to say, the State by failing to perform the conditions could claim nothing by virtue of the deed, but it was not provided that it must surrender all the rights it has acquired by virtue of the earlier instrument by a failure to keep these conditions; and to be enforced it must have been so expressly provided, as no such conditions could be implied." (Record, Original, p. 200; Printed, p. 109.)

In other words, the State was not bound by the controlling condition upon which the deed *was made and accepted*, i. e., that the tract shall be and remain the site of the capitol. If the State did not intend to abide by that condition—which was the sole, expressed condition for the *making* of it—when it accepted the deed, then a gross fraud was practiced upon the grantors. If such solemn covenants can be wiped out by the bounden party at will, they may just as well never be inserted. Courts will not presume that parties do an idle or meaningless thing. The State took the gift *cum onere*. The words "this deed shall be null and

void" were evidently inserted for the purpose of still more plainly evincing the intention to create a condition subsequent.

The breach of a condition subsequent forfeits THE ESTATE.

Vol. 6, Amer. & Eng. Encyc. Law, 2nd ed. p. 503.

The land reverts by operation of law, upon a breach, whether the deed recites that the title shall revert or not. Nor is it necessary that there shall be a clause providing for a right of reentry.

Vol. 6, Amer. & Encyc. Law, p. 501.
Horner v. Chicago R. Co., 38 Wis. 173.
Glocke v. Glocke, 113 Wis. 303 (89 N. W. 118).

A grantee who requests and accepts a deed with a condition subsequent is *estopped to deny the existence of that condition or the validity of the title thereby conveyed,* when sued for breach.

In Cowell v. Springs Co., 100 U. S. 61, the defendant took a deed from the company, with a condition prohibiting the manufacture or sale of intoxicating liquors, to be used as a beverage at any place of public resort on the premises,

> "And he is therefore estopped when sued by the grantor for the premises, upon breach of the conditions, from denying the corporate existence of the plaintiff, *or the validity of the title conveyed by its deed.* Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency *has happened, that his grantor ever had any right to it.*"

In 1893 the legislature passed an act entitled, "An act to provide for the location and erection of a capitol building," and providing an appropriation therefor, and declaring an emergency (Sess. Laws 1893, 462), Sections 1 and 16 of which are as follows:

"Section 1. That for the purpose of erecting and completing a state capitol building for the State of Washington on the site now owned and occupied by the State of Washington for the purpose at the City of Olympia, in said State, there is hereby created a board, to be known as the State Capitol Commission. Said board shall consist of five members. * * *

"Sec. 16. The attorney general shall be legal adviser of the board."

The attorney general filed a written opinion with the governor, *recommending that the State procure a deed to the land in suit from these plaintiffs* for the purpose of investing the State with the legal title. (Plaintiffs' exhibit 14; Record, Original, p. 119; Printed, p. 65.)

By direction of the proper State officers, he prepared and requested plaintiffs to execute a deed to the State for the ten acres, which they signed at his request, relying upon the representations of the State officers that the State would erect a magnificent building which would greatly enhance the value of the property which plaintiffs then owned, contiguous to the capitol site.

Mr. Fetter, in his work on Equity, p. 45, and Mr. Eaton, in his recent work on Equity, pp. 165-169, lay down the rule that, when a person by acts, admissions and representations causes another to believe a certain state of facts and to act so as to alter his own previous legal position for the worse, the attempt to assert claims inconsistent with such conduct is considered fraudulent, and such a person will be estopped.

Vice Chancellor Bacom, in his opinion in Keate v. Phillips, 18 Chanc. Div. 550, 577, states that this doctrine was established many years ago in the English law courts.

It must be conceded that before the execution of the second deed, plaintiffs held the legal title. The defendant desired to perfect its title, and requested the deed, and acquiesced in the condition inserted therein which was the sole and expressed consideration for the making of it (see paragraph No. 7, Stipulation, supra) by which it agreed to be bound by accepting it. The defendant, by its admissions, promises, covenants and representations thus caused plaintiffs to alter their legal positions for

the worse, and bettered its own legal position. It is therefore estopped by the strongest principles of justice to deny that it held said land under the condition that it must be used as a capiol site.

Other Questions Raised by the Assignments of Error.

The foregoing discussion covers the principal assignment of errors, but we desire to briefly call the court's attention to other questions not covered by the foregoing discussion which to us seem pertinent to the issue.

I.

The two deeds and various territorial and state statutes, journals and writings, being in Pari Materia, should all be read and construed together to show the intention of the parties.

Where a transaction is evidenced by several writings they will all be considered as one instrument, and will be read together, to show the intention of the parties.

Vol. 17, p. 9, and Vol. 26, p. 620, Amer. & Eng. Encyc. Law, 2nd ed.
Kent's Comm. 453.

If the second deed was only a curative deed, correcting as it did, first, the description in the first deed, by the insertion of the words "In the City of Olympia" after the words "Commencing at the corner of Main and Union streets," so as to establish the initial or starting point of the land, and, second, by asserting the real and only consideration for the first deed, then expressly and directly refers to the first, and the two deeds must be read together.

Miller v. Topeka Land Co. (Kan.), 24 Pac. 420.
Greve v. Coffin, 100 Amer. Dec. 229.
King v. Norfolk Co., 17 S. E. 868.
Foxcroft v. Mallet, 1 How. 370.

II.

The Statutes Show the Condition and the Pleadings Admit It.

Plaintiffs' motion for judgment on the pleadings or for lack of sufficient answer, made at beginning, during and at close of trial should have been granted.

The statutes show the use for which the land was donated.

By the Organic Act of Washington Territory (10 Stat. L. 172) the northerly half of Oregon Territory was organized into a "temporary government by the name of Washington Territory." The legislative assembly thereof was directed to proceed "to locate and establish the seat of government for said Territory," and (Sec. 13) the sum of $5,000.00 was appropriated for *the erection of suitable buildings* at the seat of government. Sylvester and his wife offered to the officers of the Territory of Washington the ten-acre tract of land in suit so long as it should be used as its capitol site, and when not so used it should revert to them. (Deposition Mrs. Sylvester, Pltf. Ex. 16; Record, Original, p. 126; Printed, p. 70.)

Their offer was accepted, and on January 9, 1855, the Territorial Legislature passed the following act (Laws 1854-5, p. 5):

> "An act to provide for the selection of the place for the location of the Seat of Government of the Territory of Washington.
>
> "Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, that the Seat of Government of this Territory be and hereby is established and located on a certain piece or parcel of land on the land claim of Edmund Sylvester, in the County of Thurston, in section twenty-three, township eighteen north, range two west, containing ten acres, and more particularly described as follows: (the land in suit).
>
> "Sec. 2. This act to take effect and be in force fifteen days after its passage, provided that within that time the present owners or claimants give a deed of release for the above described ten acres of land to the Territory of Washington without expense to said Territory, which shall be deemed satisfactory by a joint committee

to be appointed by both branches of the Legislative Assembly to examine and receive the same."

On January 18, 1855, Sylvester and his wife signed said deed and gave it to the special committee of the legislature for inspection, which committee returned the deed to the legislature with a report that "they were not satisfied that the title was not unobjectionable." (Journal, Sess. 1854-5, Jan. 29, 1855, p. 124.)

On January 29, 1855, the legislature passed the following act (Sess. Laws Wash. Ter. 1854-5, p. 6):

> "An act supplementary to and explanatory of an act entitled 'An act to provide for the selection of the place for the location of the Seat of Government of the Territory of Washington.'
>
> "Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, that so much of said act to which this is supplemental, as makes its going into effect within fifteen days after its passage, be and the same is hereby repealed; and that the said law is hereby now declared to be in full force and effect.
>
> "Sec. 2. Be it enacted that the *quit claim deed* of Edmund Sylvester and wife * * * to the Territory be deposited in the office of the Secretary of the Territory of Washington, and that the Governor be instructed to take possession of the said ten acres of land and hold possession thereof, for the use, benefit, and behoof of the Territory of Washington, *in accordance with the first section of the act to which this is a supplement.*"

The answer of the defendant admits that the deed was made *in accordance with* the act showing the land was to be used as the seat of government. *It admits the condition of the gift and alleges compliance with it.*

Paragraph 2, Answer (Record, Original, p. 8; Printed, p. 4) alleged as follows:

> "That on January 18, 1855, *in accordance with an act* of the Territorial Legislature of Washington, entitled 'An act to provide for the selection of the place for the location of the Seat of Government for the Territory of Washington,' passed January 9, 1855, the said Edmund

> Sylvester, under and by virtue of the federal statutes, and his wife, Clara E. Sylvester, one of the plaintiffs herein, made, executed, and delivered to the Territory of Washington, a deed in the following words and figures, to-wit:" (Here follows a copy of the deed of January 18, 1855.)

Findings No. II requested by the State and found by the court is the same, viz.:

> "II. That on January 18, 1855, in accordance with an act of the Territorial Legislature of Washington, entitled 'An act to provide for the selection of the place for the location of the Seat of Government for the Territory of Washington,' passed January 9, 1855, the said Edmund Sylvester, under and by virtue of the federal statutes, and his wife, Clara E. Sylvester, one of the plaintiffs herein, made and executed and delivered to the Territory of Washington a deed in the following words and figures, to-wit:" (Here follows a copy of the deed of January 18, 1855.)

The use to which the land was to be supplied is thus plainly admitted under the pleadings.

And in paragraph IV, Further Answer and First Affirmative Defense, it is alleged (Record, Original. p. 11; Printed, p. 6):

> "That said tract has, from the time it was taken possession of by the Territory of Washington, in 1855, to the present time, been used as a capitol site for the Territory and State of Washington."

The act of 1893 (p. 462, Sec. 1), previously quoted, shows that the land was *"claimed to be owned and occupied by the State for the purpose of a state capitol building."*

After pleading that the land was given to be used as a seat of government, and pleading compliance with that use, it cannot now be allowed to deny that the land was given for such use. As Lord Kenyon said, "A person cannot blow hot and blow cold."

III.

The Second Deed Controls.

The last deed governs and determines the status. It must control the tenure, for it confirmed its nature.

In Sperry's Lessees v. Pond, 5 Ohio 387 (24 Am. Dec. 296), it was said:

> "When the first deed was made it was (not) known where the mills would be erected. When the last deed was executed this was ascertained. * * * After the execution of this deed the premises were held according to its terms; if they vary from the terms of the first deed, the last must govern. The parties had the power and the right to vary them."

IV.

Evidence of a Grantor in Both Deeds Was Admissible.

The plaintiffs alleged the making of a contemporaneous agreement with the Territory relative to the use to which the land should be put, which was the sole consideration for the making of the first deed (Stipulation, Par. 2-3; Reply Record, Original, pp. 22-23; Printed, pp. 12-13), and at the trial offered the evidence of Mrs. Clara E. Sylvester (Deposition Record, Original, pp. 124 to 127; Printed, pp. 69 to 71)—a grantor in both deeds—to prove the agreement made with her that the land was to be used solely for a capitol site, and if not so used should revert, and that this promise, contract or condition was the sole consideration for the deed, and that no money was received. Her testimony should not have been stricken out. It was uncontradicted. There must have been *some* consideration moving to the grantors when they made their generous gift or offer to the Territory. The courts should be slow to deny the citizen the right to show his understanding and intention and all the circumstances surrounding, especially where the Terri-

tory used the land for the identical purpose which we allege they agreed to, and the State afterward confirmed and ratified that condition of tenure in the most solemn manner.

Upon this branch of the case, Root, J., dissenting, said:

> "I think Mrs. Sylvester should have been permitted to give testimony as to what the real consideration was for the grant which she and her husband made to the Territory of Washington. It is almost, if not entirely, a justifiable inference from the statutes and deed that this grant was made upon the understanding that this land was to be used as the permanent site of the capitol for the Territory and succeeding State. Her testimony was offered to fully establish this. I think it should have been received. The patriotism and beneficence manifested by Mr. and Mrs. Sylvester toward this commonwealth in its early infancy should not be repaid by a rigorous application of technical rules at this time. If, as I believe, they conveyed this land for the sole purpose of its being, and with the understanding with the territorial authorities that it should be, the permanent site of the capitol of the Territory and State, I think that good faith and fair dealing require that the land should now revert, inasmuch as it has ceased to be used for the purpose for which it was thus granted." (Record, Original, p. 200½; Printed, p. 110.)

The state court held that in offering testimony to show the real consideration moving for the first deed, we are "varying the terms of a written instrument," and held all testimony touching the contemporaneous agreement which caused the making of the first deed, and was the consideration for it, to be inadmissible.

This is not a case between a vendor and a vendee who has paid a valuable money consideration, although, even in such an instance, the actual and a different consideration paid may always be shown. We are trying to show by the grantor's testimony what was the sole and true consideration which induced her to deed. Laying technical rules aside, do not all the facts show that the only consideration these settlers received for their land was that it should be used for a specific purpose—the Seat of Government?

Where a deed has been made pursuant to a contemporaneous parol agreement it is not necessary that the deed should refer to the agreement to authorize proof thereof.

Vol. 21, p. 1112, Amer. & Eng. Encyc. Law, 2nd ed.
Rice on Evidence, p. 313.

"When, if the contract is read in the light of attendant facts and circumstances, it is apparent that it does not contain all the stipulations of the parties on the subject, the rule as to the admissibility of parol evidence to vary a written contract does not apply."

P. 1091, Vol. 21, Amer. & Eng. Encyc. Law, 2nd ed.

The purpose of a deed is but to transfer the title, not to state the contract in terms, and hence the rule that a written agreement is presumed conclusively to contain the whole contract does not apply.

A conveyance of land is commonly but part of a prior contract, and parol evidence is admissible to show the true consideration and all other parts of the transaction providing the fact of the conveyance be not effected.

Pp. 1091-1094, Vol. 21, Amer. & Eng. Encyc. Law, 2nd ed.

Any consideration not mentioned in a deed consistent with the deed may be proved.

Wright v. Stewart, 19 Wash. 184.
Richardson v. Traver, 112 U. S. 431.

A collateral oral agreement made at the date of sale of lands may be shown, since oral testimony is competent to show a consideration additional to that expressed.

Windsor v. St. Paul M. Ry. Co., 37 Wash. 156.
Galvin v. Boston El. Ry. Co., 180 Mass. 587 (62 N. E. 961).
McGrary v. McDermoth, 207 Pa. St. 620 (57 Atl. 46).

Two deeds conveying right-of-way and depot grounds recited they were in consideration of a small cash payment and advantages to result to grantor from the location of the depot. "Held, that notwithstanding the consideration was expressed, parol evidence was admissible to show a contract to maintain the depot at a specified place as a further consideration for the donation of the lands."

> "There is also the effect of a practical construction by the conduct of the parties arising out of the execution of the oral contract by the location and construction of the depot and stock pens. Upon the whole this really seems to be a case of deed executed in pursuance of a more comprehensive agreement, and hence not within the rule," excluding parol evidence.
>
> Missouri R. Co. v. Doss, (Tex.) 36 S. W. 497.

> "Nor would recital of the consideration in the deed, even if the case was based upon it, instead of the parol contract, be at all conclusive of the question; for there is no rule better settled by this court than the one allowing a party to show, by parol evidence, a consideration in addition to or different from that expressed on the face of the deed or other written memorial of the contract. We, therefore, see no reason why this action may not be maintained on the parol contract set out in the petition, and the true consideration for appellant's undertaking be shown."
>
> Louisville R. Co. v. Neafus, (Ky.) 18 S. W. 1030.
> Gulf Ry. Co. v. Jones, 82 Tex. 156 (17 S. W. 536).

Where the consideration expressed is nominal as in this case, the true consideration may be shown.

> Harvey v. Alexander, 1 Rand (Va.) 10 Amer. Dec. 519.
> Parry v. Central R. Co., 5 Colw. (Tenn.) 138.
> Vol. 6, 767, Amer. & Eng. Encyc. Law, 2nd ed.
> William v. Blumenthal, 27 Wash. 28.
> Hitz v. Nat. Met. Bk., 41 U. S. 723.
> Devlin on Deeds, Vol. 2 p. 822.
> Edwards v. Latimer, 183 Mo. 610 (82 S. W. 109).

A promise to build a railroad, or erect a sawmill, etc., which was the consideration for the deed, may be shown.

Vol. 21, pp. 771-2, Amer. & Eng. Encyc. Law, 2nd ed.
Fraley v. Bentley, — N. Dak. 23 (46 N. W. 506).

A different consideration from that expressed may be shown.

Johnson v. McCart, 24 Wash. 19.
Vol. 6, pp. 767-9, Amer. & Eng. Encyc. Law, 2nd ed.
Don. Yook v. Tacoma Mill Co., 16 Wash. 459.

That there was no money consideration may be shown.

Eckler v. Alden, 125 Mich. 215 (84 N. W. 141).

All the facts and circumstances surrounding this transaction were admissible.

Knowlton v. Rogers, 27 Wash. 216.
Mann v. O'Neil, 29 Wash. 115.
Anderson v. Harper, 30 Wash. 381.
Carr v. Jones, 29 Wash. 78.
Brockway v. Abbott, 37 Wash. 263.
Fire Insurance Co. v. Wickham, 141 U. S. 577.

Parol evidence is admissible to prove a fact about which the written contract is silent, and which induced its execution and was consideration therefor.

Jones, Evidence, Secs. 444-5.
Browne, Parol Evidence, Sec. 50.
Ruggles v. Swanwick, 6 Minn. 526.
King v. Dahl, 82 Minn. 250 (84 N. W. 737).
Gibbons v. Rush Co., 65 N. Y. Supp. 215.
McVernon Stone Co. v. Sheely, 114 So. 313.
John Hutchinson Mfg. Co. v. Pinch, 107 Mich. 12 (64 N. W. 729, 66 N. W. 340).
Hines v. Wilcox, 96 Tenn. 148 (33 S. W. 914).
Anderson v. Nat. Surety Co., 196 Pa. 288 (46 Atl. 306).

V.

The State Has Broken Its Obligation Under the Deed.

A contract was made by the State with these plaintiffs. The deed reads, "This deed is made and accepted under the express condition that this tract shall be and remain the site of the capitol," etc. Nothing is more sacred to the law than the obligation of a contract. A sovereign state may not impair its own obligation to its citizen. (Dartmouth College Case, 4 Wheat. 518.) As was said, by the supreme court, in Dodge v. Woolsey, 18 How. 351: "States are bound by all of those principles of justice which bind individuals to their contracts."

Under this contract the State commenced the erection of its capitol buildings by putting in a foundation which now rests partly upon this land and partly upon two acres adjoining (Defendant's Exhibit 3. Record, Printed, p. 53), but abandoned this project and purchased and completed, under an act of its legislature, entitled, "An act providing for the purchase and completing and furnishing of a state capitol building" (Sess. Laws 1901, p. 54), the new Thurston County courthouse site. An appropriation was also made for the removal of the State's property and effects from the old site to the new one. (Sess. Laws 1901, p. 127.) The Secretary of State removed said property. (Statement, pp. 10-15.) Under the provisions of an act entitled "An act appropriating money for the erection, completion, finishing and furnishing of the state capitol buildings and grounds," etc. (Laws 1903, p. 348), the new site, with its annexes, was completed, erected and furnished, and is now occupied by the State as its capitol building. (Plaintiff's Exhibit 3.)

The State Supreme Court held that the State

> "abandoned the project, and erected a capitol building in another part of the City of Olympia, wherein all the State officers are now situated." (Record, Original, p. 195; Printed, p. 106. Stipulation, par. 9.)

It is also held that "Biennial appropriations" for the "care and preservation" of the same had been made. This is error. The State's statutes show no such appropriations have been made since the suit was begun, and the tract abandoned in 1903.

No appropriation was made by the legislature of 1905 or 1907.

At the close of the trial in this case these plaintiffs offered to allow the State to remove the old foundation wall or to accept what the State's witness and their pleadings agreed the land was worth. This was refused. The State proved that the land without the improvements is worth ten thousand dollars. Plaintiffs offered to accept that amount and terminate the litigation. (Record, Original, p. 74; Printed, p. 50.)

Having offered to do equity, these plaintiffs ask this honorable court for a reversal of the judgment against them and a decree adjudging them to be the owners of the land.

Respectfully submitted,

.....

Attorney for Plaintiffs in Error, May D. Sylvester in *propria persona.*

Seattle, January 9, 1909.

Received a copy of the foregoing brief, which is merely a corrected copy of brief heretofore, and on or about the 11th day of April, 1908, received by me.

JOHN D. ATKINSON,
Attorney-General of the State of Washington.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908-1909

No. 40

CLARA E. SYLVESTER, et al.,
PLAINTIFFS IN ERROR.

vs.

THE STATE OF WASHINGTON,
DEFENDANTS IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR

GEORGE MARVIN SAVAGE,
Attorney for Plaintiffs in Error.

MAY L. SYLVESTER,
in propria persona

454 N. Y. Block,
Seattle, Wash.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908-1909

No. 40

CLARA E. SYLVESTER, et al.,
PLAINTIFFS IN ERROR.

vs.

THE STATE OF WASHINGTON,
DEFENDANTS IN ERROR.

EXHIBIT "A"

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, } *ss.*

I, George M. Savage, being first duly sworn, on my oath depose and say that I am the attorney of record for plaintiffs in error in the above entitled cause; that my office has been ever since the 1st day of January, 1907, and now is at 454 New York Block in the city of Seattle, Washington; that I received my mail there until the 25th day of September, 1909, at 4 p. m.; that at 4 p. m. of said 25th day of September, 1909, I left Seattle en route for this city; that up to the time of my departure there had been no attempt to serve any papers of any kind or character connected with

the hearing of this case in this court; that I left instructions with my office partner to forward to me at the St. James Hotel in this city any mail that might come for me; that up to the time of making this affidavit no mail has been received from my office and no attempt has been made to serve me with any papers of any kind or character whatever; that I arrived here on the evening of the 14th of October, 1909, and on the morning of the 15th secured from the office of the clerk of this Court a copy of the brief of defendant in error, and learned for the first time of the allegations contained in the affidavits of John D. Atkinson and E. C. MacDonald; that I did not on the 2d day of December, 1908, nor at any time prior to, nor at any time subsequent to the 2d day of December, 1908, present said stipulation to said Atkinson, nor did I ever ask him to sign it; that I never had any conversation with said Atkinson with regard to the contents of the stipulation until some months after his term of office had expired and his successor had qualified; that the stipulation was received by me through the United States mail with a letter from an attorney who is of counsel for plaintiffs in error, but not of record, asking me to sign the stipulation if it was all right and forward it to Washington city to the clerk of this Court; that at that time the stipulation was signed by John D. Atkinson; that any request for signature by Mr. Atkinson or assurances as to the contents (if any such were given) was made or given by my co-counsel and without my knowledge.

That I believe a careful examination of the record in this case will show that it does establish, all the facts as set out in the stipulation, except the admissions contained in paragraph 1 and the expression, "but had made proof of settlement," which admissions are against the interest of my clients.

That upon receipt of stipulation so signed as aforesaid I wired my co-counsel in Portland, Oregon, to withdraw our brief from the printer in order that it might be changed; that thereafter it was so changed and all reference to the claim of the State of title by limitation was taken out and the brief corrected so as to conform to the stipulation.

That the record shows that John D. Atkinson accepted service of the notice of appeal to the Supreme Court of the State of Washington and of all important papers filed in the cause subsequent thereto; that I refused to serve or have papers served on any one else as attorney for the State, as I found no authority in the laws of the State of Washington for an Assistant Attorney General.

That the record shows that John D. Atkinson and E. C. MacDonald appeared regularly and generally in this cause (Record, original page 226; printed page 126) and in this court on the 9th day of March, 1908, and up to the present time the plaintiffs in error have received no notice of substitution of other counsel.

GEORGE M. SAVAGE.

District of Columbia, City of Washington, } *ss:*

George M. Savage, being first duly sworn, on his oath says that he is the identical person who signed the foregoing affidavit; that he has read the same, knows the contents thereof, and the same are true as he verily believes.

GEORGE M. SAVAGE.

Subscribed and sworn to before me this 20th day of October, 1909.

LEWIS W. TOLMAN,
Notary Public.

(Seal) My commission will expire April 7, 1914.

EXHIBIT "B"

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Mrs. Clara E. Sylvester and
May L. Sylvester,
Plaintiffs in Error

vs.

The State of Washington,
Defendant in Error.

State of Washington, } *ss:*
County of King. }

I, A. Roger Merrill, being first duly sworn, on my oath say: That I have my office at 454 New York Block, Seattle, Washington, with George Marvin Savage; that Mr. Savage has not been in his office since the twenty-fifth day of September, 1909; that no copy of motion or brief has been left with me, nor in our office for Mr. Savage since said day of September, 1909, and prior to date October 21st, 1909; that no brief or communication was received through the United States mail bearing the return card of the Attorney General of the State of Washington from said twenty-fifth day of September until present date, October twenty-first.

A. ROGER MERRILL.

Subscribed and sworn to before me this 21st day of October, A. D. 1909.

[Seal] C. M. MILLER,

Notary Public in and for the State of Washington, residing at Seattle, Washington.

EXHIBIT "C"

IN THE SUPREME COURT OF THE UNITED STATES.

Mrs. Clara E. Sylvester and
May L. Sylvester,

Plaintiffs in Error

vs.

The State of Washington,

Defendant in Error.

State of Oregon, }
County of Multnomah. } *ss:*

I, J. O'B. Scobey, being first duly sworn, on oath depose and say, that I am of counsel in the above entitled case; that the stipulation in this case duly filed and referred to in Appellants' Brief, was signed by the then Attorney General of the State of Washington, J. D. Atkinson, upon my request but without any representations on my part as to its contents. The stipulation was sent by me from Portland by mail to the said Attorney General, J. D. Atkinson, and he attached his signature thereto and returned the same to me, and I transmitted the same to the Chief Counsel in the case G. M. Savage, at Seattle, Washington, with the request that he should sign the same and file it in the case.

J. O'B. Scobey.

State of Oregon, }
County of Multnomah. } *ss:*

I, J. O'B. Scobey, being first duly sworn on my oath say that I have read the foregoing affidavit to which I have subscribed my name, know the contents thereof and the facts therein stated are true, except such as are stated on belief and that I verily believe that such facts are true.

J. O'B. SCOBEY.

Subscribed and sworn to before me this 22d day of October, 1909.

S. J. KAMINSKY,
Notary Public for Oregon.

[Notary's Seal]

EXHIBIT "D"

E—M. L. 222144
J. H. B. 4—207 r.

Department of the Interior,
General Land Office.
Washington, D. C., October 25, 1909.

I hereby certify that the annexed copy of letter dated February 28, 1855, from the U. S. Surveyor General of Washington Territory, addressed to the Commissioner of the General Land Office, is a true and literal exemplification of the original of said letter on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affxed, at the city of Washington, on the day and year above written.

[Seal] H. W. SANFORD,
Recorder of the General Land Office.

San Francisco, Cal.
Feb. 28, 1855.

Com. Gen. Land Office,
Sir:

I arrived here a few days ago, and proceed to Salem Oregon, by the next steamer.

I find your letter to me dated Dec. 30, 1854, in which you inform me of the payment of the Bill for office furniture &c. of $1095, and decline my request for $4000.

I would send an acc't for money disbursed but cannot make a full statement till I join the clerks, who, have been sent by the way of the isthmus, and have been at work all the winter at Salem.

Immediately upon arrival there I will forward an exhibit of my disbursements to date.

As there will be some $4000 due the clerks and draughtsmen by April next, and it will save time, I beg you to send me $2000 (two thousand dollars) on account of "Extra clerk hire" before you receive my accounts.

The expense of getting from Washington City to Olympia, with the charges for all my purchases in New York freight, insurance, and all, will leave me in debt to the clerks by April.

The Sur. Genl. of California has transfer'd to me the vouchers for the furniture for my office; and I will exhibit it in my return as you order.

The excessive cost of everything on the coast, and the lapse of time incident to answers between points so remote as Washington City and Territory, and the scarcity of money in a newly settled region, combine an argument upon which I respectfully base my request for an additional advance of $2000 before I am able to make returns of the expenditure of the amount already received.

I am Sir,

Very respectfully,
Your Obt. Srvt.
(Signed) JAMES TILTON,
Sur. Gen. Wash. Tery.

To John Wilson, Esq.,
Com. Gen. Land Office,
Wash. City.

EXHIBIT "E"

161070 B Fern 4—207 r.

Department of the Interior,
General Land Office.
Washington, D. C., Oct. 18, 1909.

I hereby certify that the annexed copies of the field notes of the Donation claim of Edmund Sylvester at Olympia, Washington and letter dated December 3, 1859, to Hon. J. J. Stevens, House of Reps., are true and literal exemplifications from the records in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] H. W. SANFORD,
Recorder of the General Land Office.

The field notes referred to in this certificate appear on page 58 of printed record.

W. F. NOLAND.
Printer.

General Land Office
December 3, 1859.

Hon. J. J. Stevens,
House of Reps.

Sir:

In reply to your oral enquiry of to-day I have the honor to inform you that the certificate and proofs in the case of the Donation claim of Edmund Sylvester, at Olympia, W. T., have been returned to this office by the Register at that place, who reports, under date of 6th September last, that all title to property in the Town of Olympia emanates from Sylvester,—that the authorities of the Town do not intend to set up a claim, and there is no contest as to the title of Sylvester.

As this claim is not taken by legal subdivisions, the field notes of the survey are required, and as they are not with the papers, the Surveyor General has been this day directed to send them up, and on their receipt the patent will be issued.

With great respect
Your Obt Servant

S. A. SMITH
Commissioner.

DEFENDANT IN ERROR'S STATEMENT OF THE CASE.

Counsel state, on page 10 of their brief, that previous to the 13th day of February, 1854, said claim had been surveyed and notification filed.

As we have contended in our opening brief, there is nothing in the record to show when the notification was filed except that it was filed at Olympia and after 43.

Furthermore, plaintiffs were permitted by formal order made in open court after due notice to amend their reply to conform to the facts. (Record, original pages 89 to 116; printed, 29 to 37.)

The amendment was then made in the presence of the court and counsel for the defendant, by inserting the word not and erasing the words shown to be erased in paragraph 5, page 13, of the printed record.

We submit that this order of the court amounts to a finding that the notification was filed in the Olympia office and not in the Oregon office.

The record does not show anything with regard to the reasons for removal of the State Capitol from the land in question or that the removal was temporary, nor that Attorney General Atkinson did not take any part in the trial of said cause. We contend that the statement of the case in our initial brief is a fair and impartial statement.

ON THE MOTION TO DISMISS.

It seems to us that this motion ought not to be heard because no notice was given plaintiffs in error, as appears to be required by the fourth section of Rule 6. (Ex.-A in the fore part of this brief.)

Counsel site numerous cases to show that "No Federal question is presented." A careful consideration of those cases show that they are not in point.

The question in this case is not, did Sylvester ever have title, but **when** did he under the Federal statute commonly known as the Oregon Donation Law, get that title.

The question, when title passed, whether it passed, and to whom it passed depend upon the laws of the United States.

McCune v. Essig, 199 U. S., 390;
Anderson v. Carkins, 135 U. S., 486;
Wilcox v. Jackson, 13 Peters, 583.

In Anderson v. Carkins a bill had been filed for specific performance of a contract to deed made prior to final proof, the Supreme Court uses the following language:

> The defendant answered that the contract was void under the homestead law. * * * In as much, therefore as no decree could pass against defendants without denying the protection asserted by them under the homestead laws and the Supreme Court of Nebraska expressly declared that this invalidity under the homestead law was not sustainable, it follows that this case is one in which right specifically set up and claimed under the statutes of the United States, and that the decision and judgment of the State court were against that right.
>
> Hence the jurisdiction of this court cannot be doubted.
>
> Anderson v. Carkins, supra.

To the same effect are the decisions on jurisdiction in—

Dewey v. Demoines & C.; 173 U. S., 193;
Green Bay & M. Canal Co. v Pattern Co., 172 U. S., 58;
Des Moines Nav. & R. Co. v. Iowa Homestead Co., 23 U. S., 552;
Haire v. Rice, 204 U. S., 291.
Cincinnati Packet Co. v. Bay, 200 U. S., 183;
Rector v. City Deposit Bank, 200 U. S., 405;
Rector v. Commercial National Bank, 200 U. S., 420;
Nutt v. Knut, 200 U. S., 12.

The claim of right under the Federal statutes was first set up paragraph 5 of their complaint. After the State was substituted and claimed title under the so-called deed of January 18, 1855, the plaintiffs claimed that the deed was void because in conflict with the Oregon Donation Law, paragraph 5 of the affirmative reply (Record, original 24; printed 13 and 14). And in paragraph 18 of the affirmative reply plaintiffs raise the second Federal question, viz: "The right of the Territory of Washington under the Organic Act to take the title." (Record, printed page 27.)

The trial court used the following language:

> "The decision of this case involves a construction of the act of Congress commonly known as the 'Oregon Donation Act'." (Record, original page 175; printed 99.)

And he then proceeded to construe the act adversely to plaintiffs in error. In the same "Oral Decision" (printed record, page 100) the trial judge construed the act of March 2, 1853, commonly known as the Organic Act of Washington, adversely to plaintiffs in error.

After complete argument of the case on appeal to the State Supreme Court in which the two Federal questions were discussed at length by counsel for appellant and respondent, the Supreme Court of the State decided both questions adversely to appellants. (Record, original 92; printed, 104.)

We, therefore, contend that the Supreme Court of Washington could not have rendered the opinion and judgment in this case that it did render without deciding the two Federal questions adversely to the plaintiffs in error and denying them the immunity claimed under the Donation Act and the Organic Act.

ON THE MERITS.

In their brief, at page 21 thereof, counsel for defendant in error claim that the deed of January 18, 1855, was a valid and binding deed, and transferred the fee from Edmund Sylvester to the Territory of Washington. They assert that the record shows that Edmund Sylvester filed his notification No. 44 in 1854. It is true that the State Supreme Court in its opinion says that the deed was dated more than a year after he had given notice to the Surveyor General of Oregon, but the record shows that no notice was given to the Surveyor General of Oregon (Record, printed page 85), and that the notification was filed in the Olympia office, and that must have been after the filing of 43. If I am permitted to go out of the record, and refer to Exhibits D and E, it will readily be seen that Sylvester could not have filed his notification before March 1, 1855.

Counsel further contend that Section 2 of the Act of July, 1854, rendered the filing of notification, the survey, the final proof unnecessary and validated all sales.

But the third section of the same act declares:

> And all persons claiming donations under this act or the act to which it is amendatory shall in like manner give notice to the Surveyor General or other duly authorized officer within thirty days after being requested to do so, and failing such notice in either case claimants shall forfeit all rights thereto. * * *

Then follows a provision extending the time in which notifications may be filed until December, 1855.

10th U. S. Statutes at large, 305, and following.

Section 6 of the same act extends the provisions of the act, and those to which it is amendatory, to all the lands of Oregon and Washington Territories.

We contend, therefore, that the section referred to repealed just what is said it did, the proviso in section 4 of the original act, and nothing more, and left unchanged the provisions of sections 6 and 7, which require the settler to notify, survey, "prove up," and pay his fees, and have his proof accepted by the General Land Office. When he had done these things he had done all that the law required of him, and had earned his land, become a qualified grantee and entitled to his patent and could then sell, transfer such an equitable title as a court of equity would recognize, but before he had done all these things his rights were possessory, having no equity even that he could transfer.

On the question of the survey, our contention is that the survey that was required of Sylvester was the survey mentioned in section 6 of the original donation act, where the following language was used: "It shall be the duty of the Surveyor General to survey and mark each claim with the boundaries as claimed, at the request and expense of the claimant." That is if the claimant took on unsurveyed land he must have the survey made at his own expense by the Surveyor General or an authorized deputy, so that the boundaries of the claim might be fixed and shown upon the plats of the Surveyor General's office, and the land be thus segregated. This was done by Thomas Berry, April 22, 1857. (Record, original, page 104; printed, page 58.)

Counsel site no authorities on the question of the interpretation of the Donation Act, simply contending that the amendment authorized the sale.

We are not contending that under the amendment a sale to a bona fide purchaser for a valid consideration before patent, but after the settler had complied with all the provisions of the Donation Act, would not convey an equitable title, but that until the settler had done all that was required of him by the sixth and seventh sections of Donation Act, he had no equity. These, we contend, were settlement,

proof of settlement, notification, survey, final proof, payment of fees, acceptance of proof by Commissioner of the General Land Office.

The question of date of notification cannot be determined, but we contend that a fair construction of the record shows that it must have been subsequent to the 18th of January, 1855.

The date of the survey is established by the record as April 22, 1857, and final proof and payment of fees July 1, 1858. The Commissioner of the General Land Office refused to accept the final proof until after July 16, 1859 (Record, original page 162; printed page 89). So that up to that date Mr. Sylvester was not a "qualified donee," and his deed conveyed nothing because he had nothing to convey.

Counsel contend that the description in the deed is definite; that the record shows that the Sylvester donation claim included the town of Olympia, but the record does not show that it did not include the town of Newmarket, at that time a fairly thriving village. The record does not show that there was any point then located known as the corner of Main and Union Streets in the town of Olympia, and as a matter of fact, at the time of this deed there was no official survey of Olympia and no legal plat has ever been filed. We do contend that a deed which is so indefinite in its description as the one under consideration is too indefinite to allow the expenditure of $1,000,000.00 of the public money, and to correct this and other defects the State sought and obtained the second deed.

Counsel cite Lessee of French v. Spencer, 21 How., 228, and Irvine v. Irvine, 9 Wall., 617, to show that the deed under consideration conveyed the after acquired title of Sylvester.

Neither case is in point, for the first case was where the land was taken under a present grant, and the latter case there is nothing to show the terms under which the land was taken, but the case does show that the provision of non-alienation, such as are contained in the preemption law, had no application to that case.

In all the cases cited the parties holding under the deeds were bonafide purchasers, and without notice of defective title. In case at bar the Territory took with notice of defective title and against the express provisions of the act locating the seat of government on the land in question.

That the Territory had notice of defective title is shown by the act of January 5, 1858 (passed over two months before the Territory placed its deed on record) contains the following sections, among others:

> Sec. 6. Said commissioners shall proceed to locate said capitol building at Olympia upon the tract now occupied by the temporary capitol building, or so much thereof to which a title satisfactory to the commissioners has been or shall be made.

In section 11, same act, we find the following:

> * * * No part of the money appropriated by Congress for the erection of said capitol building shall be applied to that purpose or to improve the same until the title of Washington Territory to at least ten acres of land, including the site whereon the present capitol stands, shall be approved by the Attorney General of the United States.

Laws of Washington Territory, 1857-8, pages 4 and 5.

The language of the act is not now owned, but now occupied, and the Legislature admits the title defective.

Hawley v. Diller, 178 U. S., 485.

These citations, together with those cited on pages 36 and 37 of our opening brief, are sufficient to show that the Commonwealth of Washington took whatever it took under the deed of 1855 with notice of lack of title, and under the authorities cited on pages 34, 35 and 36 of our opening brief, is not entitled to the after acquired title.

STATUTE OF LIMITATIONS.

With regard to the statute of limitations, we contend that it is not before this court—

1. Because of the stipulation which we insist is binding, if for no other reason than the fact that we were not served with a copy of the affidavits at all, and, as is shown by Exhibits A, B and C, had no knowledge of the same until the 15th of the present month.

2. Because the trial court did not find for the defendant on the question of the statute of limitations, but did use the following language: "I would hold that the original deed of the Sylvesters to the Territory contained the provision that is, the provision as to reversion of title, such as is contained in the Sylvester heirs' deed to the State, that under the evidence there has been such an abandonment of the land for capitol purposes as would cause the title to revert." (Record, original, page 190; printed, 103.)

3. The State Supreme Court, before whom the question of the statute of limitations claim by the State was argued, did not allow the claim, but decided the case solely upon the title conveyed by the deed of January, 1855. Nowhere is there any reference to the statute of limitations. (Record, original, page 198; printed, 108.)

4. The first law allowing suits to be brought against the State went into effect in June, 1895, and as Assistant Attorney General Haight says, the Territory never permitted itself to be sued. (Record, original page 139; printed, 178.)

5. We contend that the Commonwealth of Washington, until it obtained the deed of March, 1893, held under a void deed and so holding, were our tenants at will, and could not claim the benefit of the statute of limitation; that the Territory was bound by the interpretation of its laws that its own

Supreme Court gave, and at least that its citizens had a right to rely on such decision in their dealings with the Commonwealth, and that the State claiming the property held by the Territory holds subject to the interpretation given by the Territorial Courts.

Upon the question of a party claiming under a void deed, the Territorial Supreme Court uses the following language:

> The position of the plaintiff in error that Plummer and his grantees have been holding adversely to Garrison since 1854, is untenable. They claim to have had possession under a paper writing dated 20th May, 1853, openly and notoriously from 1854 down to the commencement of this suit in 1877.
>
> But that paper writing was utterly void. Maynard's four years of residence was incomplete at the time of its delivery. It was an unlawful agreement and plaintiff in error in setting it up as the source of title of himself and his grantors, in effect, sets up that he and they had no color of title during all these years. There possession, therefore, cannot be adverse nor entitle them to the benefit of the statute of limitations.
>
> Bullen v. Garrison, 1 Wash. Ter., 590.

6. There was no breach of the condition under which the Commonwealth held until 1903, and no right of action existed.

OTHER QUESTIONS RAISED BY DEFENDANT'S BRIEF.

Counsel admit that no money was paid; that the land was deeded for capitol purposes, and suggests that the real consideration was the location of the capitol in the town of Olympia. We are glad of the admission, but suggest that the act located the seat of government on the tract in dispute; that the record does not show that the tract was in the town of Olympia, and, as a matter of fact, it was not

at that time; and we further suggest that if the testimony of one of the grantors of the deed as to what was the real consideration which induced her to sign the deed, could not be considered, the suggestion of one who probably was not born until after the deed was signed, and who had no connection with the case at bar until after it was in this court ought to have less weight.

As to the question of intention, as shown by Exhibits C, D, E, F, and G, of defendant's brief, we do not see what they have to do with the case. The appropriations, it is true, were made, but there is nothing to show that they were ever expended, and, so far as those made since the trial of this suit is concerned, they do not show anything with regard to the intention of the members, who did remove the capitol and locate it on the present site. The trial court found there had been an abandonment, such as would work a forfeiture under the deed of 1893. If then, for any of the reasons that we have assigned, the first deed was void the land has been forfeited, and we are entitled to our writ of ejectment.

U. S. v. Tichenor, Fed.

Counsel for defendant in error raise for the first time in the history of this case the question, "That only the State can proceed to declare a deed to a corporation void, because the grantee was not authorized to take title.

Nothing in the pleadings warrant their injecting this question into the case at this time. It was not raised at the trial nor on the argument before the Supreme Court of the State:

> "No such claim was made in the court below, therefore it cannot be heard now."
>
> Roderiguez v. Vivoni, 201 U. S., 377.

Counsel contend, on page 35 of their brief, that the officers who took the deed of 1893 had no authority to take the deed, because of no specific legislative declaration authorizing the purchase. If the Territory of Washington had

power under the organic act authorizing it to expend $5,000 for buildings, to secure title to land, surely a law authorizing the officers to expend one million dollars justified them in securing title to the land. Again, if the officers of the State were not authorized to perfect the title of the State without special legislation, then the officers of the Territory were not authorized to take title in direct opposition to the plain mandates of the law, as was attempted when they took the deed of January 18, 1855.

Respectfully submitted,

GEORGE MARVIN SAVAGE,
Attorney for Plaintiffs in Error.

MAY L. SYLVESTER,
In Propria Persona.

13

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 40.

CLARA E. SYLVESTER ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF WASHINGTON, DEFENDANT IN ERROR.

ADDITIONAL MEMORANDUM FOR DEFENDANT IN ERROR.

W. P. BELL,
Attorney General,
Attorney for Defendant in Error.

W. V. TANNER,
W. F. MAGILL,
GEORGE A. LEE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 40.

CLARA E. SYLVESTER AND MAY L. SYLVESTER,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF WASHINGTON.

ADDITIONAL MEMORANDUM FILED BY DEFENDANT IN ERROR.

In pursuance to the request of the court, the defendant in error has had the following laws printed and has filed the same in the above-entitled cause. We wish, however, to call the court's attention to the fact that in section 5 of chapter 95 of the Laws of 1895 the limitation applies only to *personal* actions and *not to actions affecting the title to real estate.*

WASHINGTON TERRITORY LAWS.

1854.

* * * * * * *

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That actions can only be com-

menced within the periods herein prescribed, after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute. But in the district court, the objection that the action was not commenced within the time limited, can only be taken by answer.

SECTION 2. The period prescribed in the preceding section for the commencement of actions, shall be as follows:

Within twenty years,

1st. Actions for the recovery of real property, or for the recovery of the possession thereof, and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

* * * * * * *

LAWS OF WASHINGTON.

1873.

* * * * * * *

Chapter II.

Limitation of Actions.

SECTION 25. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but in the district court the objection that the action was not commenced within the time limited, can only be taken by answer.

SECTION 26. The period prescribed in the preceding section for the commencement of actions shall be as follows:

Within twenty years:

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of the action.

* * * * * * * *

WASHINGTON CODE.

1881.

* * * * * * *

SECTION 25. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but in the district court the objection that the action was not commenced within the time limited, can only be taken by answer.

SECTION 26. The period prescribed in the preceding section for the commencement of actions shall be as follows:

Within ten years:

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

* * * * * * *

BALLINGER'S ANNOTATED CODES AND STATUTES OF WASHINGTON.

* * * * * * *

SECTION 4797. Actions to be Commenced in Ten Years. The period prescribed in the preceding section for the commencement of actions shall be as follows:

Within ten years,—

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action (Cf. L. '54, p. 363, section 2; Cd. '81, section 26; 2 H. C., section 112; see ref. to section 4796, *supra;* see Or., section 4; see Cal. C. C. P., section 318).

* * * * * * *

LAWS OF WASHINGTON.

1895.

* * * * * * *

Chapter XCV.

(H. B. No. 529.)

Authorizing Actions Against the State.

An Act Authorizing Actions Against the State.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Any person or corporation having any claim against the State of Washington shall have the right to begin

an action against the State in the Superior Court of Thurston County. Such action shall be begun against the State of Washington by filing a complaint in such superior court, setting forth the nature of such claim, and containing a direction to the defendant to appear within twenty days after service of the complaint exclusive of the day of service, and defend the action, and a notice that in case of failure to do so, judgment will be rendered against the State according to the prayer of the complaint. The plaintiff in such action shall, at the time of filing his complaint, file a bond or undertaking with two or more sureties to be approved by the clerk of the court to the effect that such party will indemnify the State against all costs that may accrue in such action, and will pay to the clerk of said court all costs in case the plaintiff shall fail to prosecute his action or to obtain a judgment against the State.

SECTION 2. Service of the complaint shall be made by the sheriff of the county in which such action is brought, or by any of his deputies, by delivering an attested copy thereof to the attorney general, or by leaving such copy in his office, and by delivering another like copy to the secretary of state, or by leaving such copy in his office.

SECTION 3. The attorney general or his assistant shall appear and act as counsel for the State. The action shall proceed in all respects as other actions. Appeals may be taken to the Supreme Court of the State as in other actions or proceedings, but in case an appeal shall be taken on behalf of the State, no bond shall be required of the appellant.

SECTION 4. No execution shall issue against the State on any judgment, but whenever a final judgment against the State shall have been obtained in any such action, the clerk shall make and furnish to the auditor of State a duly certified transcript of such judgment; and the auditor of State shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid out of the State treasury.

SECTION 5. All provisions of law relating to the limitations of personal actions shall apply to claims against the State, but the computation of time thereunder shall not begin until this act shall have become a law.

Passed the House March 12, 1895.

Passed the Senate March 14, 1895.

Approved March 20, 1895.

* * * * * * *

Respectfully submitted.

W. P. BELL,
Attorney General of Washington,
Attorney for Defendant in Error.

W. V. TANNER,
W. F. MAGILL,
GEORGE A. LEE,
Of Counsel.

FILED
OCT 15
JAMES H. McKENNEY,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1908,

CLARA E. SYLVESTER *et al.*,
Plaintiffs in Error,
vs.
THE STATE OF WASHINGTON,
Defendant in Error.
} No. 40.

BRIEF OF DEFENDANT IN ERROR

W. P. BELL,
Attorney General,
Attorney for Defendant in Error.

W. V. TANNER,
W. F. MAGILL,
GEORGE A. LEE,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1908,

CLARA E. SYLVESTER *et al.*,
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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

W. P. BELL,
Attorney General,
Attorney for Defendant in Error.

W. V. TANNER,
W. F. MAGILL,
GEORGE A. LEE,
Of Counsel.

BRIEF OF DEFENDANT IN ERROR.

EXHIBIT "A."

STATE OF WASHINGTON, COUNTY OF THURSTON, ss.

I, John D. Atkinson, being first duly sworn, on my oath depose and say, that on the 2d day of December, 1908, and for more than three years prior thereto, I was the duly elected, qualified and acting Attorney General of the State of Washington; that as said Attorney General my name appears as one of the counsel in the above entitled cause in the Superior Court of Thurston County, and in the Supreme Court of the State of Washington. That I did not take any part in the trial of said cause in either of said courts; that I knew nothing about the facts in the case as proven or found, except in a general way. That on the 2d day of December, 1908, George M. Savage, appellant's attorney, presented the stipulation heretofore filed herein, a copy of which is printed in the appellant's brief on pages 2 and 3 thereof, and requested that I sign the same and stated to me that said stipulation stated the facts substantially as found by the courts, and that by signing said stipulation a great amount of expense would be saved appellant in taking the appeal and printing of the transcript or record in said case. That, relying upon said statement, and believing that the same would in no way prejudice the rights of the state in said litigation, and believing further that the stipulation con-

formed to the facts as found by the State Supreme Court, and without any investigation of the matter or comparing the same with said decision, I signed said stipulation. That since signing said stipulation I find that the facts are not as stipulated therein. I find that there was no testimony introduced or permitted to be introduced showing the consideration for the delivery of the deed dated January 18, 1855, as stipulated in paragraphs 2 and 3 of said stipulation, and personally I do not know what was the consideration.

That the claim had been surveyed and a notification had been given prior to the making of said deed, and the stipulation in paragraph 4 stating that Edmund Sylvester had not had the claim surveyed and had not filed his notification prior to making said deed is untrue, and does not state the facts as found by the Supreme Court.

That a survey was made and notification was filed prior to January 18, 1855, and, if the survey and notification was made as stipulated in paragraph 5 of said stipulation, then the said notification and survey was a second and subsequent notification and survey of said claim.

That there was no defect in the deed of January 18, 1855, that would in any way affect the title of the state.

That I do not know of my own knowledge the truth of the statements contained in paragraph 7 of said stipulation, and do not wish to be bound thereby. That to the best of my knowledge and belief the plaintiffs could have brought suit prior to the admission of the state in 1889, if they had so desired. That I have no personal knowledge of the facts stated in paragraphs 9 and 10 of said stipulation except as shown by the records in said cause, and for that reason said

stipulation or any part thereof should have no bearing or weight with the court, except where the same is corroborated by the findings of the Supreme Court of the State of Washington.

WHEREFORE, I ask and pray that said stipulation be withdrawn and that the same be not considered by the court.

JOHN D. ATKINSON.

Subscribed and sworn to before me this 24th day of August, A. D. 1909.

C. E. BRAGG,

(NOTARIAL SEAL.) *Notary Public in and for the State of Washington, residing at Olympia.*

EXHIBIT "B."

STATE OF WASHINGTON, COUNTY OF THURSTON, ss.

I, E. C. Macdonald, being first duly sworn, on my oath depose and say: That I was Assistant Attorney General of the State of Washington from 1905 until January 13, 1909; that during said time the case of *Sylvester v. State of Washington* was tried in the Superior Court of said state for Thurston County and in the Supreme Court of said state; that I took no part in said trial, knew nothing at all about the facts in said case, either as alleged, proven or found, except in a general way, and do not know anything of my own knowledge concerning the facts in said case except from reading the report thereof. When in Washington, D. C., in December, 1908, the Clerk of the Supreme Court called my attention to a stipulation in the above entitled cause, signed by George M. Savage, attorney for appellant, and John D. Atkinson as Attorney General, and asked me if I desired to

sign the same, saying said stipulation had no binding force or effect on the part of the state, as Mr. Atkinson had not been admitted to the bar of said court; and thereupon, without knowing the facts, and without comparing the facts stated in said stipulation with the facts found by the State Supreme Court, I signed said stipulation, relying entirely upon the same being correct by reason of the fact that it was signed by the Attorney General. That I was not requested to sign said stipulation by the Attorney General, and had no authority to sign the same, except my general authority as Assistant Attorney General of the state.

WHEREFORE, I ask and pray that my name be withdrawn, and that said stipulation be given no force or effect by reason of my signature having been attached thereto.

E. C. MACDONALD.

Subscribed and sworn to before me this 24th day of August, A. D. 1909.

F. T. HOUGHTON,

(NOTARIAL SEAL.) *Notary Public in and for the State of Washington, residing at Olympia.*

EXHIBIT "C."

FROM THE GENERAL APPROPRIATION BILL OF 1901.

Session Laws 1901 of the State of Washington, page 127.

For the repair of the shed over and the preservation of the capitol foundation upon the present capitol grounds: (*Provided*, That the money herein appropriated for such repairing and preservation of said capitol foundation shall be returned to the general fund of the state treasury from the proceeds of the sale of land granted to the state for the

erection of public buildings at the state capitol next after the payment of warrants heretofore issued against the fund provided for from said proceeds).....$1,000

EXHIBIT "D."

FROM APPROPRIATION BILL OF 1903.

Session Laws of the State of Washington, 1903, p. 404.

For repair of shed over and preservation of capitol foundation upon present capitol grounds.....$1,000

EXHIBIT "E."

APPROPRIATION FOR GOVERNOR'S RESIDENCE.

Chapter 49 of the Session Laws of 1907 created a State Building Commission, and provided for the building of a residence for the Governor at Olympia, and in section 2 of said act is the following:

"*Provided*, That if the title of the State of Washington to that tract of land known as the 'Old Capitol Site' in Olympia is confirmed in the Supreme Court in the case now pending therein, then and in that event, the governor's residence shall be erected upon some portion of said tract to be selected by the State Building Commission."

And section 7 of said act, page 72, appropriates as follows:

"There is hereby appropriated out of the state capitol fund, for the purchase of site, construction and completion of said governor's residence, and furnishing the same, and all expenses incident thereto the sum of thirty-five thousand dollars, or so much thereof as may be necessary."

EXHIBIT "F."

FROM APPROPRIATION ACT OF 1909.

Session Laws 1909 of the State of Washington, page 880.

FOR GOVERNOR'S MANSION.

To be expended under the direction of the State Building Commission, as provided in Chapter 49 of the Session Laws of 1907.

Maintenance at $2,000 per year	$ 4,000
Furnishing mansion	15,000
Improving grounds	2,000
Total	$21,000

EXHIBIT "G."

The Legislature of 1909, Session Laws of 1909, page 124, being chapter 69 of said laws, passed an act, entitled as follows:

"An Act relating to the sale of lands granted for public buildings at the state capitol, providing for the payment of all the claims against the capitol building fund and for the erection and completion of a capitol building, and making an appropriation for the carrying out of the provisions of this act and declaring an emergency."

Section 5 of said act is as follows:

"All sales shall take place at the state capitol and the proceeds of such sale of lands, or the timber or other materials, shall be paid into the capitol building fund to be used: First. In the payment of all warrants or claims against such fund; and second, for the construction of a capitol building on the foundation, or first story, now completed on what is known

as the 'old capitol site,' such capitol to be built according to the plans heretofore prepared and known as the 'Flagg plans,' with such modifications and improvements therein as may be deemed advisable by the commission: *Provided, however*, That all contracts for the construction of said capitol building shall be let after notice for proposals or bids have been advertised for at least four (4) consecutive weeks in at least three newspapers of general circulation throughout the state: *And provided further*, That said commission shall not award any contract for the construction of said capitol building until sufficient sales have been made to take up all outstanding claims against said capitol building fund, and sufficient sales to cover the amount of contract."

STATEMENT OF THE CASE.

This action was commenced in the Superior Court of the State of Washington, for Thurston County, on January 1, 1905 (Transcript, page 2), to recover possession and quiet title to ten acres of land particularly described in said complaint, but known in the proceedings as the "old capitol site." This ten acres of land was a portion of the original donation claim of Edmund Sylvester, and was deeded to the Territory of Washington by Edmund Sylvester and Clara E. Sylvester on January 18, 1855 (Transcript, page 4); said deed having been executed some five years prior to the time the said Edmund Sylvester received patent to said claim. The proof shows, however, that said Edmund Sylvester had lived continuously upon said claim from the 1st day of January, 1850; and that previous to the 13th day of February, 1854, said claim had been surveyed and notification given in due form to the Surveyor General of Oregon as provided by law (Transcript, pages 55, 56 and 57). Prior to the making of said deed by Edmund Sylvester and wife to the Territory of Washington, the legislature of the territory had located the seat of government upon this land, as it was duly authorized to do by the Organic Act (10 U. S. Stat. at Large, 172 *et seq.*), and immediately upon receipt of said deed, the Territory of Washington proceeded to erect a building upon said premises with the $5,000 appropriated by Congress in the Organic Act for said purpose, and had full, adverse and uninterrupted possession of said premises, and each and every

part thereof, from said January 18, 1855, until this suit was commenced, January, 1905, and has had full, complete and uninterrupted possession of said premises ever since said date.

That in 1893 the then Governor of the state requested the Attorney General to examine the title to said premises before commencing the new capitol building. This examination was made, and report thereof made to the Governor, which report closes as follows:

"That if the title of the state is equitable, there is nothing but the bare legal title without beneficial interest outstanding the possession of the state and its officers cannot be interfered with; the state is entitled to deeds from the holders of the legal title without further expense than the cost of the conveyances, and on refusal of such holders to execute the same they can be compelled to execute them or their titles may be appropriated under condemnation proceedings with no more than a nominal award.

"I have prepared the requisite deeds to invest the state beyond all question with the full legal title, and I am informed that their execution is to be secured, and that they will be at an early date delivered to the state." (Transcript, page 81).

The deed made in pursuance of said report contained the following provision:

"Provided, however, and this deed is made and accepted upon the express condition that said tract shall be and remain the site of the capitol of Washington, and in the event of the location of the capitol elsewhere than upon said tract, these presents shall be null and void." (Transcript, page 19).

In 1901 it became necessary to have more room for the carrying on of the state's business, not only for offices but for the legislature and committee rooms, and at that time the state capitol lands could not be sold except at a great sacrifice, and if sold at that time would not have brought a suffi-

cient amount to have built a permanent capitol for the state, and the legislature then as a temporary expedient purchased the Thurston County court house, and provided for the building of additions thereto (Laws 1901, p. 54), and they further appropriated the sum of $1,000 for repairing the sheds and protecting and preserving the foundation of the capitol building. And in 1903 the legislature (Laws 1903, p. 404) appropriated $1,000 for the purpose of maintaining and preserving said foundation.

In 1907 the legislature passed an act providing for the building of a residence for the governor, and appropriated $35,000 for that purpose, and provided that said building should be erected upon the old capitol site, provided the Supreme Court of the state should hold that the title to said property was in the state. The Supreme Court did so hold (Transcript, p. 104 *et seq*), and thereafter the residence was built upon said tract, and in 1909 a further appropriation of $15,000 was made for the furnishing of said building, and $4,000 for the maintenance thereof, and $2,000 for improving the grounds. The state legislature further provided for the appointment of a capitol commission to sell the capitol lands and erect a capitol on the old foundation, and upon the plans originally intended when the foundation was constructed, with such modifications and improvements as the commission might make (Session Laws of 1909, p. 126). The Superior Court after hearing all the testimony found the issues in favor of the defendant and against the plaintiff, and entered judgment, quieting title to said land in favor of the State of Washington. This judgment was affirmed by the Supreme Court in every particular, and from the judgment

of the Supreme Court this writ of error is sued out to the Supreme Court of the United States.

After said judgment was entered and said writ of error sued out, and the record in the case prepared, and long after the case was filed in the Supreme Court, the attorney for the appellants and the Attorney General of the State of Washington entered into a stipulation, wherein and whereby it was stipulated that the facts in this case are radically different from the facts found by the Superior or the Supreme Court.

The records show that the Attorney General did not take any part in the trial of said cause, and did not appear therein in any manner, except as Attorney General his name appears as one of the counsel for the state, and he has made an affidavit which appears in the fore part of this brief, stating that he took no part in said cause, and knew nothing at all about the facts in the case except in a general way, and that he simply signed said stipulation, believing that it stipulated the facts as found by the Supreme Court, and for the purpose of saving expense in printing the record and preparing the said case for the Supreme Court of the United States; and Mr. Macdonald, his assistant, makes an affidavit showing why he also signed the affidavit. As this stipulation was signed long after the record was prepared and filed in the Supreme Court of the United States, and the same was not relied upon in any way in preparing the record and presenting the case to the Supreme Court up to the time of printing appellants' brief, the appellants have not been misled in any way, nor will they lose any rights that they had in this case by said stipulation being stricken from the record; for on pages 45

et seq. they have argued the question fully as to the error of the court in refusing to admit the testimony of Mrs. Sylvester as shown in the deposition (appellants' brief, pp. 9 and 10).

The other points stipulated are also raised in the brief, and fully argued as to the existence of such facts. (Statement of the Case, pp. 4, 5 and 6, appellants' brief).

It is the contention of the respondent that by taking a bargain and sale deed for a valuable consideration, it was an innocent purchaser, and any title accruing to the grantor subsequent to the date of said deed inured to the benefit of said grantee.

That the deed of January 18, 1855, was not defective, but contained a sufficient description to properly identify and locate the said land.

That the plaintiffs could have brought suit at any time between 1855 and 1905 against the persons occupying said land and tested the title in that manner.

That the statute of limitations (which was 20 years) ran against said grantors prior to 1881; that in 1881 the statute of limitations was reduced to ten years, and thereafter the ten-year statute of limitations ran before the opinion written by the Attorney General in 1893; and that under either statute and both statutes the limitation had fully run, and all actions by the grantor or his heirs were barred.

That the deed of March 21, 1893, was of no binding force or effect upon the state for any purpose, for the reason that no one was authorized or had any power to bind the state to accept any deed, much less a deed bearing any conditions affecting the title to said property.

That there has been no permanent removal of the capitol from the old capitol site, as shown by the acts of the legislature printed in the fore part of this brief. And for that reason, under no circumstances has there been any forfeiture.

That there is no federal question raised by this writ of error. And the record shows that no federal question was raised or considered or passed upon by the state courts in this case.

MOTION TO DISMISS APPEAL.

Comes now the respondent, the State of Washington, and moves the court to dismiss the appeal herein, for the reason that no Federal question is involved, and that the court is without jurisdiction to try and determine this cause.

ARGUMENT ON MOTION.

The statement in the writ of error is probably sufficient to give this court jurisdiction, but the assignment of errors and the argument of plaintiffs in error show clearly that there is no federal question involved. On page 12 of their brief plaintiffs in error say:

"We contend that the plaintiffs are entitled to the writ prayed for in their complaint, for that:

I.

"The instrument under which the defendant claims title was void.

"(a) Because the purported grantors had nothing but a 'squatter's right,' the settler at the time of the execution of the instrument not having complied with all the provisions of the Oregon donation law. He had not filed his notification. He had not had the claim surveyed. He had not 'proved up.' He had not paid the fees by law required and his proof had

not been accepted by the Commission of the General Land Office.

"(b) Because the description of the land sought to be conveyed was vague and indefinite.

"(c) Because the instrument was not sealed as by law required.

"(d) Because the grantee named therein was not authorized by law to take title to land; and,

"(e) Because the same was against public policy and prohibited by statute.

II.

"That the heirs at law of Edmund Sylvester, until the delivery of the deed of March 21, 1893, were the owners of the land in controversy, or at least were the owners of the legal title, and on the breach of the conditions, the legal title reinvested in them.

III.

"That the state is estopped to deny that it held the land in controversy under the deed of March 21, 1893."

We fail to see where any federal question is raised by either of the three propositions. The first simply claims that a certain deed was void. The second, that the heirs of Edmund Sylvester were the owners of the legal title of the land in dispute until March 21, 1893, and upon a breach of the conditions of the deed of that date the title revested in them; and the third, that the state is estopped to deny that it owns the land in controversy under said deed of March 21, 1893.

These are purely local questions, affecting the title to real estate in the State of Washington between citizens of the State of Washington and said state, and the stating of the propositions refutes any claim, it seems to us, that a federal question is involved. True, the land in dispute was a part of a donation claim of the said Edmund Sylvester, but both parties claim under said Sylvester, who received the patent to

the land in 1860, but who had lived upon and cultivated said claim from January, 1850. Neither the plaintiffs in error or the defendant in error question the validity of the grant from the United States government to Sylvester; in fact, both parties to this action claim under him; the State of Washington through the deed executed by the said Edmund Sylvester and his wife to the Territory of Washington, January 18, 1855, and the plaintiffs in error as heirs of the said Edmund Sylvester.

"No federal question is presented in an action to recover possession of certain lands, when both parties claim title from the same public source, and both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it."

Romie et al. v. Casanova, 91 U. S. 379.

See also:

State ex rel. Hastings v. Jackson et al., 112 U. S. 233;
McStay v. Friedman, 92 U. S. 723;
Maney v. Porter, 45 U. S. 55;
Wynn v. Morris, 61 U. S. 3;
Mellinger v. Martupee, 73 U. S. 259.

"The patent offered by the plaintiffs seems to have been the only authority under the United States drawn in question in the state court, and the decision was in favor of its validity. It is only when in such a case the decision is against the authority that this court has advisory jurisdiction."

Ryan v. Thomas, 4 Wall. (U. S.) 603.

"This court has no jurisdiction to re-examine the judgment of a state court where a federal question was not passed upon, and where the decision of it was unnecessary in the view which the court below took of the case, or where the error was one of the jury alone, the charge of the court being correct."

McMannis v. O'Sullivan, 1 Otto 578.

"If the record shows that a federal question was not necessarily involved and does not show that one was raised, the court will not go outside of it to the opinion or elsewhere to ascertain whether one was in fact decided."

Moore v. Mississippi, 21 Wall. 636.

"It is necessary in order to give the Supreme Court jurisdiction over the judgment of a state court that it should appear that one of the questions mentioned in the statute was raised and presented to the state court, and that such question was decided by the state court against the title, right, privilege or immunity especially set up or claimed by the plaintiff in error under the constitution, treaty, statute, commission or authority of the United States, or that such question was necessary to the judgment or decree rendered in the case."

Murdock v. City of Memphis, 20 Wallace 591.

"If such claim of right of the plaintiff in error was erroneously decided by the state court, still, if the judgment of the state court can be sustained by any other ground or issue adjudged in it, the judgment will be affirmed."

Murdock v. Memphis, supra.

"Under the 25th section of the Judiciary Act of 1789, Chap. 20, where the construction of any clause in the constitution or any statute of the United States is drawn in question in any suit in a state court, the decision must be against the title or right set up by the party under such clause of the constitution or statute or this court has no appellate jurisdiction in the case. It is not sufficient that the construction of a statute was drawn in question and that the decision was against the title of the party; it must appear that his title depended upon the statute."

Williams v. Norris, 12 Wheat. 117.

"A writ of error from the Supreme Court of the United States to a state court will be dismissed for want of jurisdiction *when no claim of federal right was especially set up or called to the attention of the state court in any way.*"

Onondaga Nation et al. v. Thatcher, 189 U. S. p. 306.

In this case no claim whatever was made in the state court that a federal question was involved, and no federal right was claimed.

"Where the Supreme Court of a state decides a federal question in rendering the judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Hammond et al. v. Johnston, 142 U. S. 73.

Plaintiffs claim also that their contract as evidenced by the deed of March 21, 1893, has been impaired, and for that reason this court has jurisdiction.

"In order to come within the provisions of the United States Constitution which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state and not by a decision of the judicial department only."

Central Land Co. v. Laidley, 159 U. S. p. 103.

"This court is not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because such judgments in their effect impair obligation of contracts. It must be the constitution or statute of the state which impairs the obligation of a contract, or the case does not come within our jurisdiction."

Knox v. Exchange Bank, 12 Wall. 379.

"This court cannot as an appellate tribunal reverse the decision of a state court because that court may hold a contract to be void which this court might hold to be valid. It must be the constitution or some law of the state which impairs the obligation of the contract or which is otherwise in conflict with the Constitution of the United States, and the decision of the state court must sustain the law or con-

stitution of the state in the matter in which the conflict is supposed to exist, or the case for this court does not arise."

Mississippi & M. R. R. Co. v. Rock et al., 4 Wall. 177.

For the foregoing reasons, and upon the authorities above cited, the respondent submits that the said writ of error should be dismissed.

ARGUMENT ON THE MERITS.

I.

The instrument under which defendant claims title was a valid and binding bargain and sale deed, and transferred the fee from Edmund Sylvester to the Territory of Washington. The evidence shows (Record, p. 81 *et seq.*) that Edmund Sylvester made settlement upon said land in January, 1850, and had lived continuously upon the same until January 18, 1855, and had filed his notification of said settlement in 1854.

The amendatory act of July 17, 1854, was in force and effect at the time of the execution and delivery of the deed in January, 1855, section 2 of which reads as follows:

"And be it further enacted, That the proviso to the fourth section of the act of 27 September, 1850 above mentioned, by which all contracts for the sale of lands claimed under that law before the issue of the patent therefor are declared void, shall be and the same is hereby repealed: *Provided*, That no sale shall be deemed valid unless the vendor shall have resided four years upon the land."

Vol. 10, Statutes at Large, p. 305.

There is no question but that Mr. Sylvester had resided on this land five years before the making of this deed, and under the above proviso he was clearly authorized and empowered to execute a valid deed of said land or any part thereof.

The plaintiffs in error contend in subdivision A that Sylvester had not filed his notification; had not had the claim surveyed; and had not "proved up." None of these things were required by the amendment and proviso above quoted.

In subdivision B plaintiffs in error contend that the deed is void because the description is vague and indefinite.

But it will be seen by an examination of the deed (Record, p. 4) that this land is described as being in a certain section, township and range; and the point of beginning of the particular description being the northwest corner of Main and Union streets. Plaintiffs contend on page 25 of their brief that Main and Union streets may be in any number of towns and villages in the County of Thurston; but there is only one section 23, township 18 north, range 2 west in said county, and it is impossible that there could be more than one point that would answer the description of the northwest corner of Main and Union streets in this one section. It will be seen by examining the record (p. 83) that Edmund Sylvester claimed that this land included the town of Olympia within its boundaries. And further it will be seen that the act of the legislature (Record, p. 13) providing for the locating of the seat of government on this land described the same as being a certain distance from the northwest corner of Main and Union streets *in the town of Olympia*. We therefore submit that there would be no difficulty in proving the commencing point for this description; and that therefore the description of the land was not vague or indefinite.

In subdivision C it is contended that the instrument is void because it was not sealed as the law requires. And plaintiffs in error contend in their brief that under the law at that time it was necessary to have some foreign substance attached as the seal in order to give the instrument validity. If this is true, which we by no means concede, the defect was cured by

an act of the legislature, being section 2 of chapter 97 of the Session Laws of 1888, p. 184, which reads as follows:

"All deeds, mortgages or other instruments in writing for the conveyance or encumbrance of real estate or any interest therein which have heretofore been executed without the use of a private seal, are, notwithstanding, hereby declared to be legal and valid in all courts of law or equity in this territory."

The legislature had undoubted authority to pass such an act, and by so doing the defect, if any existed in said deed, was cured.

Under subdivision D, plaintiffs in error contend that the deed is void because the territory was not authorized to take title to land.

It is true there is no provision in the Organic Act specifically authorizing the Territory of Washington to acquire title to real estate, but the said territory was organized by Congress as a government, and in the act organizing the territory $5,000 was appropriated for the purpose of building a capitol at the seat of government. It would be impossible to build a capitol without having some place upon which to build the same, and it would certainly be very injudicious and unwise to build the same upon ground or land not owned by the territory. And it therefore seems to us that it could never be successfully contended that it was the intention of Congress that the territorial capitol should be built on land that did not belong to the territory; and we therefore submit that by providing for the building of a capitol Congress impliedly granted authority to the territory to secure a site therefor.

But if the territory did not have any authority to purchase

land for a site of a capitol (a proposition we by no means concede) the grantor is estopped from making this claim or raising such objection to the validity of his deed. We maintain that in a case of this kind the same rule will apply as in the case of an alien, or a corporation, that is prohibited from acquiring and holding real estate. It has been uniformly held, as we believe, that in such cases only the state can proceed to declare the deed or conveyance invalid. It was so held in this state in *Abrams v. State*, 45 Wash. 327, and in *Myers v. McGavock*, 42 Am. St. Rep. p. 644, the court say:

"The Union Pacific Railway Company because it took title to this property in violation of the constitution did not thereby become an outlaw; nor does the fact of its incompetency to be a grantee of such property authorize any one to appropriate the property who may see fit to bring a suit for that purpose. The citizen has no right, title or claim as such to property attempted to be acquired in contravention of law, whether the person attempting such acquisition be an English lord, a Turkish pasha or an ordinary foreign railroad company. It would be a monstrous construction of this constitution to say that if A should for a valuable consideration convey his real estate to B, that because B was incompetent under the law to take such conveyance, that therefore the title should revert to A."

In *Barrow v. N. & C. T. Co.*, 28 Tenn. Rep. 304, the court held:

"Want of power in a corporation to hold land creates no equity in the vendor to rescind."

In the following cases it was held that a deed is not void but only voidable at the instance of the state.

M. V. L. Co. v. Bushnell, 11 Neb. 192;
Russell v. Railroad Co., 68 Texas 646;
National Bank v. Mathews, 98 U. S. 621;
Tarpey v. Deseret Salt Co., 5 Utah 494.

We deem it unnecessary to cite further authority in support of this contention.

Under subdivision E plaintiffs in error claim that said deed is void because the same is against public policy and prohibited by statute; but as shown by the amendatory statute above quoted it was not against the statute for Mr. Sylvester to convey this land after he had been in possession of and cultivating the same for four years, and therefore as the authority to make the deed before patent was expressly conferred by this law, it could not be against the law, and being in conformity with the law it was not against public policy.

II.

Plaintiffs in error contend that the heirs at law of Edmund Sylvester, until the delivery of the deed of March 21, 1893, were the owners of the land in controversy, or at least were the owners of the legal title, and on breach of the conditions the legal title revested in them.

The defendant in error contends that the land here in dispute, and the fee thereto passed from Edmund Sylvester and his wife to the Territory of Washington under the deed of January 18, 1855, and that the title received from the government by Edmund Sylvester through the patent to his donation claim inured to the benefit of the territory. The above mentioned deed is a bargain and sale deed (Record, p. 4) and is in part as follows:

"Witnesseth, That for and in consideration of the sum of one dollar to them the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have this day bargained and sold and

by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part all that certain lot ***

"To have and to hold the same to the said party of the second part forever free from any claim of the said party of the first part, their heirs and assigns or any or all persons claiming by, through, from or under them or either of them."

This deed certainly conveyed the fee in said land, and was sufficient to pass an after acquired title.

In the case of *Apgar v. Christopher*, 33 Fed. 201, in a bill to enjoin defendant from prosecuting an action of ejectment, one of the parties who had only a life estate undertook to convey in fee his share of the estate to his cotenant, and she and her husband deeded the land to the party through whom, with others, the plaintiff claims. The brother then died and willed the property to parties and defendant as the only heir at law. Held, that the fee which was intended to be conveyed by the deed to the sister passed to the plaintiff as after acquired title. The court say:

"Generally, a deed of bargain and sale, without covenant of warranty, for the conveyance of land, conveys only the interest vested in the grantee at the time of its execution, and, under the rigorous rules of the common law, would not operate to pass an after acquired interest; but when, from the contents of the instrument, as by a recital or otherwise, it manifestly appears that the parties believed they were negotiating for the fee, and it was the intention of one to sell and convey, and of the other to buy and accept, the land on that belief and understanding, the averment of the grantor that he possessed the fee, and intended to convey it, will in equity, if not in law, estop him from setting up an after acquired title, in contradiction of his own solemn declaration. In other words, equity will decree that a deed containing such a recital, in the absence of fraud, being for a sufficient consideration, and not contravening the rights of creditors, will pass the subsequently acquired estate. The doctrine of estoppel

by deed is well settled. It is founded on the plainest principles of justice, which will not permit a man to gainsay his own expressed declarations to the injury of another who, in good faith, has relied and acted on them."

"When the evidence shows that the ancestor of the plaintiff had sold and transferred his interest in the settlement right, or contract of land, five years before its confirmation by the government, although confirmed in his name, it inures to the benefit of the transferee and the heirs of the original grantee cannot recover it."

O'Brien's Heirs v. Smith, 16 La. 94.

A bargain and sale deed passes the fee.

1 Devlin on Deeds, Sec. 23.

In the case of *Nixon's Heirs v. Carco's Heirs*, reported in the 28 Miss. 414, at pages 425-6, the court say:

"This right, at the date of the conveyance, was not a mere naked possession. It was an inchoate right to the land, recognized by the government, and for the completion of which the party entitled to it might well rely on the good faith of the government. There was nothing in the act of congress which secured the right to prohibit the transfer of it, and there is nothing in the objects or policy of the acts which would prevent it. It was, therefore, a substantial equitable right which the party holding it might transfer; and when the title was confirmed in his name it enured equitably to the benefit of his vendee. This has been distinctly held by the supreme court of Louisiana, and we think correctly, upon acts of congress similar to, if not the same as, the acts under which the right in this case accrued. *O'Brien v. Smith*, 16 La. R. 94; *Rhodes v. Rhodes*, 10 Ib. 85. And the principle on which it is founded has been sanctioned by other courts. *Jenkins v. Noel*, 3 Stew. (Ala.) 77; *Alexander v. Duke of Wellington*, 6 Eng. Ch. R. 383; *Massie v. Sebastian*, 4 Bibb. 433.

"The cases to the contrary cited in behalf of the appellee are decided upon the preemption acts of congress, which expressly prohibit the transfer of the settler's right; and the acts of congress (1804, Sec. 14, and 1807, Secs. 1 and 2),

relied upon as prohibiting the settling or exercising acts of ownership over the public lands, refer to persons exercising such acts of possession or ownership after the passage of those acts, and not to cases of settlement and inchoate right which had taken place before the passage of those acts, and been recognized as legal, as is the case in this instance.

"But it is said that the instrument of sale executed by Carco is not binding on his heirs, because it is not executory and contains no covenant of warranty.

"If the instrument purported to be, or was in fact, a mere quitclaim of an interest in the land not then *in esse*, the authorities cited from 14 J. R. 193, and 1 Cow. 616, would be pertinent to show that the heirs were not estopped by the act. But it is admitted to have been intended as a valid and sufficient sale; and we have above seen that the right intended to be sold was a subsisting equitable one, and that the sale was not void for illegality. It purports to have been made for a valuable consideration, and to be a conveyance of his right; and it is manifest that the present claim of his heirs is utterly inconsistent with the right intended to be conveyed by him. If it were a formal *bargain and sale*, there can be no pretence but that it would estop the heirs; and it is conceded that it was intended as such. It must, therefore, be considered as having that effect in equity, and to fall within the general rule, that the heirs cannot set up a subsequently acquired title against the deed of bargain and sale of his ancestor. *Aldridge v. Kincaid*, 2 Litt. 391."

"It is undoubtedly true, that a vendor or mortgagor will not be permitted to purchase in or set up outstanding encumbrances in derogation of the title conveyed by his deed, and of the assurance contained in it, and that if he purchases an outstanding title, it enures to the benefit of his vendee * * * And it is held that, under our laws, the terms 'grant, bargain, and sell' in a deed of conveyance, of themselves import covenants of general warranty of title, and against encumbrances and for quiet enjoyment, as effectually as though such covenants had been expressly contained in the deed."

Bush v. Cooper, 26 Miss. 612.

Where a party appointed another his attorney, by instrument under seal (1784) and gave him authority to transact all business in connection with the land granted to the former by Congress or the state of New York, and the latter was to take the land into his possession as his own property, and the following clause was contained in the instrument, "I do hereby grant, bargain, and sell the said lands to William McRudy, his heirs and assigns forever," it was held, to be conveyance by bargain and sale and sufficient to transfer the title to a lot in a military tract subsequently patented to the grantor as a revolutionary soldier.

Willson v. Betts (N. Y.), IV Denio, 201.

Where plaintiff brought action of ejectment and defendant claimed through deed from grantor who had been given deed by Handley before he acquired title by patent, the court held that the deed given was sufficient to pass the after acquired title to Handley's grantee. The plaintiff contended for the following instruction, and excepted to the refusal to give the same:

"1st. That if Handley conveyed the land in contest, in 1796, before the issuing of his patent, and he was not then in possession of the land, but the same was vacant and in possession of no one, that his deed conveyed no title to Worthington."

But the court, referring to this instruction, said:

"The first of these instructions the court properly refused to give; for though Handley had not title at the date of his deed, yet when he obtained title, it enured to the benefit of his grantee, and all persons claiming under him were estopped to deny he then had title."

Griffith v. Huston, 7 J. J. Marshall (Ken.), 385.

In *Lessee of French and wife v. Spencer et al.* (U. S.), 21 Howard 228, the grantor had received a warrant for land, under act of Congress passed in 1816, and conveyed by an instrument to the grantee said land in words, "do grant, bargain, sell, transfer, assign and set over" said lands, and authorizing said grantee and his heirs and assigns to make location of the lands and as his attorney or attorneys to, irrevocably, obtain and receive the patent or deed to land. Held, that the patent being issued to the grantor, it inured to the benefit of the grantee and related back to the date of entry, and that the heir of the grantor was estopped from setting up a legal title under the patent. No covenant of warranty was contained in the deed and it is purely a bargain and sale deed.

In *Hannon v. Christopher*, 34 N. J. Eq. 459, it was contended on the one hand that a deed of bargain and sale without covenants would not pass an after acquired title. The deed used the terms, "grants, bargains and sells." Habendum clause declares that the grantee, and his heirs, and assigns, shall have and hold the lands, to her and their use, absolutely forever. The defendant brings action of ejectment, claiming the deed passed and conveyed only a life estate. The court holds, however, that from the deed it appears that a fee simple estate was intended to be conveyed, and that the after acquired title inures to the benefit of the grantee.

In the above case the following quotation is made and approved from the case of *Van Rensselaer v. Kearney et al.* (U. S), 11 Howard 297:

"That if the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with an estate of a particular description or

quality, and that the bargain proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterward denying that he was seized of the particular estate at the time of the conveyance."

In this case the life tenant had deeded the land during the life of the remainderman. When the remainderman died the court held that the after acquired title inured to the grantee in the deed, and that those claiming under the grantor are estopped by the deed.

Where plaintiffs brought ejectment against defendant, and defendant claimed that an after acquired title of the grantor inured to its benefit under the deed of partition, the court in that case said, in part:

"This doctrine is well supported. So, where the deed imports to convey a fee, though it lack a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire."

Pendill v. Agricultural Society, 95 Mich. 491.

Where an action of trespass was instituted to try title and the question arose as to whether the deed given by the Lowery sisters would pass the estate which was after acquired when their mother died (she not having signed the deed), the appellant claiming under a judgment deed of later date from the judgment in case brought by the sisters through their legal representative, they having been adjudged insane, the court say:

"If the grantors, the Lowery sisters, did not possess the estate which the deed purports to convey, nevertheless, as it

was their clear intention, shown by the deed, to convey a fee simple, they and their privies, whether in blood, in estate, or in law, are estopped to claim by an after acquired title, though the deed contains no warranty. The language in the deed whereby the grantors 'convey' the fee simple estate in the land constitutes a recital which imports an assertion by them that they are the owners in fee simple of the land; and having thus asserted the fact of their ownership, the grantors are estopped to deny such fact."

Lindsay v. Freeman, 83 Texas 264.

"There is no principle in our law better or more firmly settled, than that on which the judge instructed the jury, that if a man sells and conveys land to which he has no right or title, but afterwards buys or acquires the title to the same land, he cannot claim it against his grantee."

Root v. Crock, 7 Pa. St. 378.

Where a party brings action of ejectment against his brother, and it appeared that the plaintiff had given deed to defendant for the land before patent was issued, and while plaintiff was an infant, and defendant introduced evidence that he furnished the money with which to pay for said land and plaintiff settled on the same for him, the title acquired by patent inures to the benefit of the grantee.

Irvine v. Irvine, 9 Wall. (U. S.) 617.

Where a party conveyed land to another, under whom the defendant claims, when the grantor had no title, and the grantor afterwards acquires title to land including that conveyed to the grantee as above, the deed to the grantee of such party containing a covenant of seisin, such after acquired title inures to the benefit of the party's grantee.

Brown v. McCormick, 6 Watts (Pa.) 60.

When a vendor undertakes to sell a fee title for a valuable consideration, when he at the time has less than a fee simple,

and he afterwards acquires the interests of the remaindermen, he then holds such after acquired title in trust for his vendee, and will be decreed to convey it to his use; and if the vendee has mortgaged his title, such perfection of the title inures to the benefit of the mortgagee.

Clark v. Martin, 49 Pa. St. 299.

Where plaintiff brought ejectment and claimed through patent and other deeds, and defendant relied upon conveyances for delinquent tax sales after the party had deeded the land, held, that the subsequent acquiring of patent to the land inured to the benefit of the party's grantee under deeds of bargain and sale.

Smith v. Williams, 44 Mich. 240; 6 N. W. 662.

We submit that the foregoing authorities clearly establish the proposition that a bargain and sale deed conveys an after acquired title, and that the grantor in such a deed is estopped from claiming to the contrary.

III.

The statute of limitations had run against the claimants in favor of the territory and the state prior to the making of the deed in 1893, and all interest the plaintiffs in error had in said land was barred. The plaintiffs claim that they are not barred by the statute of limitations for the reason that the territory did not permit itself to be sued, and that so long as that condition prevailed the territory could not claim the benefit of the statute of limitations; but it was held in *Stanley v. Schwalby*, 162 U. S. p. 255, that "the United States and its officers may avail themselves of the statutes of limitations." And this was in a case where it was also held that

the United States did not permit itself to be sued in such cases. And it was also held in said case that the United States was an innocent purchaser for value, although the only consideration for the deed was the locating of a fort upon said land. In the same case on a former hearing, 147 U. S. p. 508, it was held that the United States, although not bound by the statutes of limitations, are entitled to take the benefit of them.

Article 27 of the Constitution, section 4, is in part as follows:

"• • • and all the estate, real, personal and mixed, and all judgments, decrees, bonds, specialties, choses in action, and claims or debts, of whatever description, belonging to the Territory of Washington, shall enure to and vest in the State of Washington, and may be sued for and recovered in the same manner, and to the same extent, by the State of Washington, as the same could have been by the Territory of Washington."

We maintain, therefore, that the *land* was sold by Edmund Sylvester to the Territory of Washington; that he had a right to make this deed; that when he secured a patent the title conveyed by said patent inured to the benefit of the territory; that the territory by open, notorious and adverse possession secured full title to said property prior to the admission of the state into the Union; that under the above quotation from the Constitution all right, title and interest that the territory had in said land passed to the State of Washington; that on March 21, 1893, the state was the owner in fee simple of said land and each and every part thereof, and had full legal title thereto, and that there was no interest conveyed to the state by the deed from the plaintiffs of that

date; and where there is no interest conveyed by a deed, any conditions in the deed are void.

Devlin on Deeds, Sec. 960.

Alemany v. Daly, 36 Cal. 93.

Defendant further contends that the officers who secured said deed had no authority to bind the state to any conditions that might be contained in said deed. The legislature is the only power that can authorize the purchase of land for and on behalf of the state, and consequently is the only authority that can state the conditions upon which said purchase shall be made; and the record in this case (p. 65) shows that this deed was executed upon the suggestion of the Assistant Attorney General, and that no mention was made, even to the Governor, that there was any conditions contained therein.

In the case of *N. O. & Carrolton R. R. Co. v. City of New Orleans*, 34 La. Ann., page 433, the court held that without legislative enactment the attorney general had no authority to bind the state by any stipulation or admission made by him in said action, and say:

"We mean to say that the state is not here by any authority competent to bind her by any assent to the claims of plaintiff, as presently urged, in virtue of which it might be said (and is said in the Attorney General's brief) that the charter of plaintiff, being a contract between the plaintiff and the state, to which they are the only parties, and these parties agreeing as to the scope and meaning of said contract, the city as a third person, has no right to question such construction. Such an assent could only be given by legislative action, and the very question which we have to determine is whether that assent has been so given. This question must be settled by an examination of the legislative acts on the subject, and not, certainly, by the allegations of this intervention."

We therefore submit that the state is not estopped to deny that it held the land in controversy under the deed of March 21, 1893.

OTHER QUESTIONS RAISED BY THE ASSIGNMENTS OF ERROR.

I.

Plaintiffs in error contend that this is only a curative deed, and if this is true, then there was no consideration whatever for the insertion of the condition in said deed, and said condition was null and void and of no force and effect. Further than this, the condition simply was that the *deed* should be void if the capitol was moved, and did not purport in any way to affect the right, title or interest that the state then had in the property, and did not provide for a reversion in case of removal.

II.

This is simply a local question as to pleading, and as we take it, is not within the jurisdiction of this court.

III.

Sperry's Lessees v. Pond, 5 Ohio 387, is not in point in this case for two reasons:

1. In this case the parties all knew the location of the land, and the grantee took immediate possession of the same and occupied it under a deed, from the description of which the same could be accurately located at any time; and,

2. No person connected with the taking of the second deed had any authority to bind the state by any conditions.

"It is not claimed that there was any law authorizing any one to purchase this property, and without such authority the purchase was void."

U. S. v. Tichenor, 12 Fed. Rep. 421.

We therefore submit under this authority that where there was no law authorizing the agents of the state to take a deed, that the act of the agents in attempting to do so would be void.

IV.

The act of the legislature locating the capitol on this land clearly indicated the purpose for which the land was to be used; and undoubtedly the land was deeded for that purpose, but there was no condition in the deed that the land should revert should the territory cease to use said land for capitol purposes, and evidence is not admissible to prove that there was an oral understanding to this effect which was not incorporated in the deed.

Plaintiffs in error cite the dissenting opinion of Judge Root on page 46, but this dissenting opinion cites no law upon which the same is based, and simply states a bare sentiment against which, he insists, technical rules of construction should not be enforced. There is no proof in this case of any patriotism or beneficence manifested by Mr. and Mrs. Sylvester toward the commonwealth; and in addition to this, the location of the state capitol upon their donation claim and maintaining the same there for fifty years was sufficient

consideration and benefit for the transfer of less than one-thirtieth part of their claim to the territory.

"An advantage inuring to a city from the establishment of military headquarters there by the United States is such a valuable consideration for a deed from the city as to make the United States a *bona fide* purchaser of the land."

Stanley v. Schwalby, 162 U. S. 255.

V.

The question of the state having broken its obligation under the deed is raised in our motion to dismiss, on the question of impairing the obligation of a contract. As therein stated, and under the authorities cited, the rule clearly is that the contract must be impaired by a law enacted by the state legislature, and not by a decision of the state courts upon the validity of the contract or the rights of the contracting parties thereunder.

If, however, the court should hold that this is a question that the court has jurisdiction to consider, then the defendant maintains that the location of the capitol on the ground and the maintenance of it there for fifty years was a sufficient compliance with the conditions; and further, that the deed of 1893 does not provide that the land shall revert but only that the deed itself shall be void. The condition in the deed is as follows:

"Provided, however, and this deed is made and accepted on the express condition, that said tract shall be and remain the site of the capitol of the State of Washington, and that in the event of the breach of the foregoing conditions, or in the event of the location of the capitol elsewhere, than upon the said tract, *these presents shall be null and void.*"

That is, if any interest had been conveyed under said deed, by the removal of the capitol site elsewhere, the deed to that interest, whatever it was, became null and void. There is no statement in the deed that the land or any interest not conveyed by that deed should revert to the Sylvesters, and it would not have been possible for the Attorney General to have affected the state's title in that manner. The deed became null and void only to the extent of the interest conveyed by it, according to the express terms and conditions of the deed, and if it had contained other and broader provisions, would have been void as contrary to statute and beyond the power of the officer attempting to receive the deed upon such conditions.

Appellants contend the territorial government accepted the deed conditionally and the lands granted could not be used for any other purpose than as a seat of government, and upon the removal of the same the title would revert. There is nothing in the statutes or deed to warrant this claim. The law of January 9, 1855, provided "That the seat of government of this territory be and hereby is established and located on a certain piece or parcel of land on the land claim of Edmund Sylvester," etc.

The act was to take effect in fifteen days "provided that within that time the present owners or claimants *give a deed of release for the above described ten acres of land* to the Territory of Washington," etc. Not give conditionally but absolutely. The act of January 29, 1855, removed the limitation of fifteen days and put the act in effect immediately and directed the taking possession of the land.

The "seat of government of the territory" was immediately established on the land and kept there during the entire territorial period. The territory performed its consideration.

The deed was not accepted conditionally, *nor does it provide for a reversion.* Even if it had been granted and accepted for capitol purposes the plaintiffs in error would be without standing.

"In 1816 the legislature moved the county seat of Wayne county from Salisbury to Centreville, where it remained until 1874, when it was removed to Richmond. In 1819 the owner of certain land situated in Centreville, in consideration of the seat of justice having been permanently established in Centreville, and for no other consideration, conveyed it to A, B and C, by name, the commissioners of the county, 'and their successors in office, for the use of said county.'

"Held, that this was, in effect, a conveyance to the county; that the grantor had received a sufficient consideration for the conveyance from the presumed benefit he derived from the location of the county seat at Centreville from 1819 to 1874, and that the land conveyed did not revert to the grantor or his heirs when the county seat was removed to Richmond."

Summers v. Darnell, 128 Ind. 38.

The court in this case, in reviewing the authorities, said:

"In *Heaston v. Board, etc.*, 20 Ind. 398, the conveyance was to 'the board of trustees of the County Seminary of Randolph county, and their successors in office forever, to have and to hold the premises aforesaid, with all the appurtenances, to the only proper use, benefit and behoof of said 'board of trustees for the use of said seminary forever.' It was claimed that this created a condition subsequent, and that the premises having ceased to be used as a seminary, the grantor was to recover the land. The court held that the corporation received an unconditioned title, which was not defeated by the alleged failure to use the premises for the purposes of a seminary, or by using it for other purposes; that there was nothing in the deed that imported a condition, and that if the grantor intended that the property conveyed

should not be used otherwise, that estate should be forfeited and revert, the condition should have been expressed or fairly implied.

"In *Seebold v. Shitler*, 34 Pa. St. 133, land upon which a court house and jail had been erected was conveyed to the commissioners by name, and their successors in office, 'in trust for the use of the said county, in fee simple.' The county was subsequently divided, the seat of justice removed, and trustees appointed to sell the lots. Held, that there was no reverter.

"In *Adams v. County, etc.*, 11 Ill. 336, a land owner proposed that if the county seat should be located at Pottsville he would give land for a court house and other county purposes. The proposition was accepted, and the General Assembly passed 'an act to locate permanently the seat of justice of Logan county,' and it was located at Pottsville. Subsequently the county seat was removed. It was held that the grantor was without remedy. The suit was to recover the money rather than land, but it was held that the deed was unconditional.

"In *Harris v. Shaw*, 13 Ill. 456, land was conveyed to commissioners, by name, and their successors in office, for the use of the county forever, in consideration of one dollar, and that the county seat had been located on the premises. The county seat was afterwards removed, and the grantor sued to recover the land. It was held that there was no condition and that he could not recover."

To the same effect are the following authorities:

City of Portland v. Terwilliger, 16 Ore. 465;

Coffin v. City of Portland, 16 Ore. 77;

First M. E. Church v. Old Columbia, etc. Co., 103 Pa. St. 608;

Pachall v. Passmore, 15 Pa. St. 307;

Rawson v. Inhabitants, etc., 7 Allen 125;

Packard v. Ames, 16 Gray 327;

Crane v. Inhabitants, etc., 135 Mass. 147;

Sohier v. Trinity Church, 106 Mass. 1;

Board, etc. v. Patterson, 56 Ill. 111;

Lawe v. Hyde, 39 Wis. 345;

Weir v. Simmons, 55 Wis. 637;
Brown v. Caldwell, 23 West Va. 187;
Southard v. Central R. R. Co., 2 Dutch. 13;
Barrie v. Smith, 47 Mich. 130;
Gage v. School District, 64 N. H. 232;
Page v. Palmer, 48 N. H. 385;
Morrill v. Wabash, etc. R. D. Co., 96 Mo. 174;
Thornton v. Trammell, 39 Ga. 202.

"It is questionable whether the appellants would be entitled to a recovery if the deed contained a condition subsequent.

"It appears from the finding that the county seat remained at Centreville from 1817 to 1873, a period of fifty-six years, and that this suit was brought more than seventy years after the location of the seat of justice at Centreville. *It may fairly be presumed that the grantor, at the time he executed the deed to the commissioners, owned other property, the value of which he expected would be enhanced by the location of the county seat, or he had other interests to be subserved thereby. If so, we may also infer that he received, during his lifetime and while a resident of Wayne county, the substantial benefit of his donation.*

"In *Hunt v. Beeson*, 18 Ind. 380, it was held that the maintenance of a tan-yard for the period of twenty-four years was a substantial compliance with the condition contained in the conveyance.

"In *Mead v. Ballard*, 7 Wall. 290, a conveyance upon a condition than an institute 'shall be permanently located upon said lands,' was complied with by the location of the institution thereon August 9th, 1848, and its remaining there until 1857.

"In *Jeffersonville etc. R. R. Co. v. Barbour*, 89 Ind. 375, the use, for thirty-three years, of lands granted 'expressly for the use and purpose of depot grounds,' and providing that if not used for that purpose it should revert to the grantors, was held to be a performance of the conditions so as to prevent a forfeiture."

Sumner et al. v. Darnell, 128 Ind. 45.

See also:

Ward v. New England Screw Co., Fed. Cases No. 17,157 (1 Cliff. 565);

Rawson v. Inhabitants, 89 Mass. 125;

Watterson v. Ury, 3 Ohio Cir. Dec. 171.

The plaintiffs in error have cited numerous authorities, but under our view of the law none of them are germane to this controversy. The cases cited affecting title to donation claims were concerning rights acquired or alleged to have been acquired prior to the expiration of the four years residence and cultivation provided for in the amendatory act of 1854 (*supra*), and do not in any way affect the title here in dispute; and the other cases are concerning homestead claims, preemption claims, timber claims, etc., and are therefore not applicable to the facts in this case.

If, by any process of reasoning, the court should conclude that there was intended to be a condition subsequent contained in the deed of January 18, 1855, we would suggest that the real consideration for such deed was not the location of the capitol upon this particular piece of land, but was the location of the capitol *in the town of Olympia*, and that the capitol of the state is now located at Olympia, and in fact upon a portion of the original donation claim of the said Edmund Sylvester; and the increase in value of the remainder of his land by the location of the capitol on said claim and the maintaining of it in the city of Olympia was in no way affected by the removal of the said capitol from one portion of said land to another. It was undoubtedly the object of the said Edmund Sylvester to secure the permanent location

of the capitol at Olympia, and as the capitol is still at Olympia, and on a portion of his claim, there has been no injury either to said Sylvester or to the heirs of his estate by reason of its removal; and if for convenience or through necessity the capitol was even permanently removed a short distance, as shown in this case, the state should in good conscience and equity have the benefit of one site to aid in procuring another. But we insist that the records clearly show that the capitol has not been permanently removed, and that there is no proof or showing that the State of Washington ever abandoned the land in dispute as a site for the state capitol.

By the exhibits in the fore part of this brief it is clearly shown that the legislature had no idea or thought of abandoning the land as a capitol site, and that the same was simply vacated temporarily as a matter of expediency. The legislature (Laws 1901, p. 54) provided for the purchase of the Thurston County court house, and at the same session (p. 127) made an appropriation for protecting and preserving the foundation walls of the new capitol building. The next legislature made an appropriation for the same purpose, and the next legislature would have undoubtedly done the same thing if this suit had not been commenced; and the following legislature in 1907 provided for the erection of a Governor's mansion upon this tract in case this suit was decided in favor of the state; and the last legislature made an appropriation for the maintenance of the Governor's mansion situate on this land, and the care of the grounds, and also provided for the appraisal and sale of the state lands and the building of a *permanent capitol upon this same foundation*, and upon the

original plans, except such changes and modifications as the Commission might deem necessary.

Our position is that the legislature is the only power in the state that could abandon this land or in any way affect the title thereto, and that the action of the legislature clearly shows that there was no abandonment, and for that reason this action cannot be maintained.

We therefore most respectfully submit that, on the merits, the decision of the Supreme Court of the State of Washington should be affirmed.

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